TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1919

No. [redacted] 280

EMILY M. MAGUIRE, PLAINTIFF IN ERROR,

vs.

WILLIAM D. T. TRETTY, TAX COMMISSIONER OF THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MASSACHUSETTS.

FILED JANUARY 24, 1920.

(30,960)

(26,908)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 822.

EMILY M. MAGUIRE, PLAINTIFF IN ERROR,

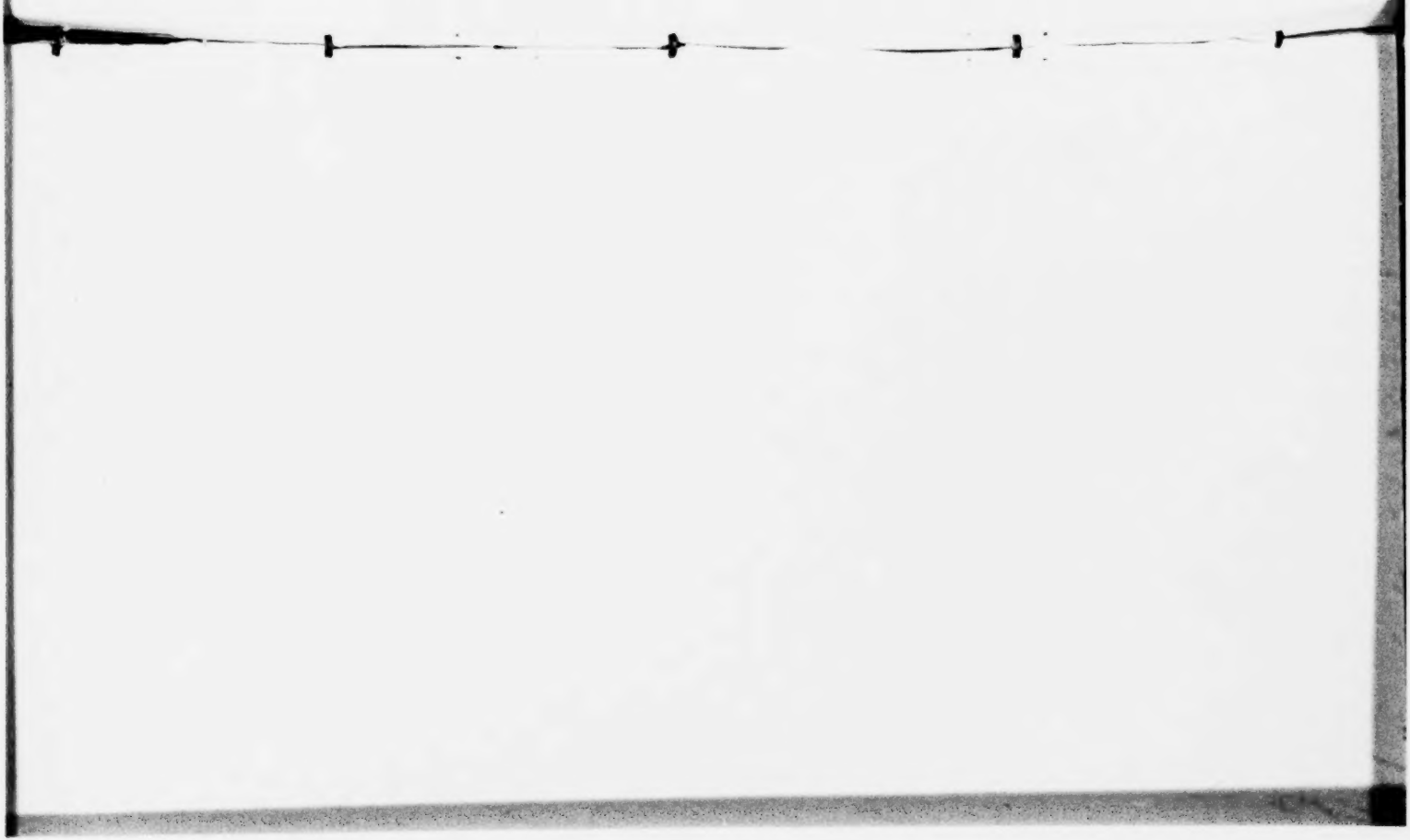
vs.

WILLIAM D. T. TREFRY, TAX COMMISSIONER OF THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1919.



1 1. COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

To all persons to whom these presents shall come, Greeting:

Know Ye, that among the records of our Superior Court, within and for the County of Middlesex, Anno Domini, 1918, it is thus contained, to wit:

2. COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

EMILY M. MAGUIRE, of said Cambridge, in said County of Middlesex, Complainant,

v.

TAX COMMISSIONER OF THE COMMONWEALTH, Respondent.

Complaint under Chapter 269, Section 20, of the General Acts of 1916.

To the Honorable the Justices of the Superior Court, sitting within and for the County of Middlesex:

1. Respectfully complains Emily M. Maguire of Cambridge in said County of Middlesex and says that on or about February 14, 1917, she filed with the respondent a return of her income received during the calendar year 1916, as required by Chapter 269 of the General Acts of 1916. That by said return she disclosed certain taxable income. That the respondent unlawfully required her to disclose under section or schedule F of her return certain income not legally taxable by this Commonwealth, in the sum of four hundred ninety-nine and 63/100 dollars ($499.63), which latter
2 income she returned under protest, as appears from the copy of Schedule F of her return hereto annexed marked A.

2. That the income so returned under protest was derived from personal property held in trust for the benefit of your complainant and others for her and their respective lives, with limitations over, by the Girard Trust Company, a corporation duly organized under the laws of the Commonwealth of Pennsylvania and having its usual place of business at Philadelphia in said Commonwealth and not being an inhabitant of or having any place of business in the Commonwealth of Massachusetts. That said trust was established by the will of Matilda P. MacArthur, late of said Philadelphia, deceased, a copy of the relevant provisions whereof is hereto annexed marked B. That Grayson P. MacArthur, named as a beneficiary

under said will predeceased the testatrix and died intestate and unmarried. That prior to January 1, 1916, said testatrix died and her will was duly probated in, and said Girard Trust Company was duly appointed trustee thereunder by, the Orphans' Court of the County of Philadelphia in said Commonwealth of Pennsylvania and that said Trust Company has been, and has acted as, trustee at all times relevant to this complaint. That a schedule of the personal property so held in trust under said will during 1916, and of the income derived from said property, is hereto annexed marked C. That the trustee, according to the terms of said will, has periodically remitted to your petitioner her share of said income by cheques mailed from Philadelphia, Pennsylvania, to Cambridge, Massachusetts. That the personal property aforesaid was in 1916 as a whole legally taxed to said trustee under said testamentary trust in said Commonwealth
of Pennsylvania, the tax being assessed and paid for city,
3 county, and state purposes at the rate of four mills upon each
dollar of face value of the taxable securities contained in the fund, under and according to the provisions of the Pennsylvania statute of June 17, 1913 (P. L. 507, #335), Sections 1 and 17. That said tax was payable, and was paid by the trustee, out of gross income. That certain securities contained in the trust fund were not taxed directly to the trustee, as appears from said schedule C. That of these securities the bonds of the Central Iron and Steel Company, of the Mohawk & Malone Railway Company, and of the Philadelphia & Erie Railroad Company were exempt because the debtor corporations paid to the Commonwealth of Pennsylvania a tax for and on behalf of the owners of said bonds, under the Pennsylvania statute of June 30, 1885 (P. L. 194, Sec. 4; 4 Purdon's Dig., 13th ed., 4544, Sec. 28). That said tax although paid by said corporations, was in fact and substance a tax upon the individual bond owners, as appears from said statute and from the adjudged case of

In re Wyoming Valley Ice Co., 145 Fed. 267 (1906).

That the certificates of the Southern Railway Equipment Trust were exempt because all payments of interest or principal to the owners of said certificates were payments of rental for the use of tangible personal property having a situs outside the Commonwealth of Massachusetts and as rental were non-taxable under the laws of Pennsylvania. That the shares of stock in the Frankford & Southwark Passenger Railway Company and the General Asphalt Company were exempt under the Pennsylvania statute of January 3, 1868 (P. L. 1318, Sec. 1; 4 Purdon's Dig., 13th ed., 4659, Sec. 252), because said corporations paid to the Commonwealth of Pennsylvania a tax on their capital stock under the Pennsylvania
4 Statutes of July 22, 1913 (P. L. 903, #431) and June 2,
1915 (P. L. 730, #336). That said tax on capital stock was not a tax upon the shares of stock owned by individuals, but was a tax upon the entire fund or mass of capital stock owned by said corporations and lying within the jurisdiction of Pennsylvania,

as appears from the foregoing statutes and from the adjudged cases of

Commonwealth v. New York, &c. R. R. Co., 185 Pa. St. 169 (1898), and
Delaware, &c. R. R. Co. v. Pennsylvania, 198 U. S. 341 (1905).

That all the securities, documents, and other evidences of title belonging to or respecting the trust at all times since its creation have been kept physically in Pennsylvania in the exclusive custody and control of the trustee. That the law of Pennsylvania as set forth by the statute of May 8, 1889 (P. L. 123, Sec. 1; 4 Purdon's Dig., 13th ed., 4886, Sec. 44), the relevant portion whereof follows:

When all the persons for whose benefit a valid trust shall have been created by deed or will * * * shall have removed from this state into any other state or territory of the United States, to permanently reside therein, the court * * * is hereby authorized and empowered * * * to direct the trustee or trustees * * * to pay over said trust moneys, or transfer the securities in which they may have been invested, to a trustee or trustees duly appointed by the court of such other state or territory: Provided, however, It shall be made to appear to the satisfaction of the court making such order or decree of transfer, that the trustee or trustees so appointed by the court of such other state or territory, have given security in double the amount of the trust funds to be transferred, and that such security has been approved by such court, and the adjudged case of

5 Arfwedson's Estate, 26 Pa. C. C. Rep. 212 (1901),
Kayser's Estate, 18 Pa. C. C. Rep. 609 (1896), and
Sharswood's Estate, 23 Pa. Dist. Rep. 127 (1914),

requires a locally appointed testamentary trustee to keep the trust fund within said Commonwealth, no matter where he resides, unless its removal is permitted by special order. That no such order has been made with respect to the trust under the will of Mrs. MacArthur.

That unless and until such an order is made, a fund held in trust under the will of a Pennsylvania testator by a locally appointed trustee is subject to the Pennsylvania four mill tax, irrespective of the residence of the trustee or beneficiaries, as appears from the adjudged case of

Lewis v. County of Chester, 60 Pa. St. 326, at 330 (1869).

That the Pennsylvania statute of June 14, 1836 (P. L. 633, Sec. 20; 4 Purdon's Dig., 13th ed., 4888, Sec. 51), the relevant portion whereof follows:

When any assignee or trustee * * * shall have removed from the state, or ceased to have a known place of residence therein, during the period of a year or more, it shall be lawful for the court

having jurisdiction, on due proof thereof, to dismiss such assignee or trustee,

as construed by the adjudged cases of

Plummer's Estate, 43 Pa. C. C. Rep. 595, 597 (1915) and
In re. The American Banking & Trust Co., 17 Pa. C. C.
Rep. 274 (1895),

provides that removal of a trustee from the Commonwealth is ground for his dismissal. That the Pennsylvania statute of May 17, 1871 (P. L. 269, Sec. 1; 4 Purdon's Dig., 13th ed., 4923, Sec.
6 103), the relevant portion whereof follows:

Any trustee * * * appointed by any court in this commonwealth, or by virtue of any last will or testament, may lawfully execute the duties of his trust, whether a resident of the county in which the trust was created, or in which the decedent had his domicil, or not; but the court * * * may * * * appoint or refuse to appoint as trustee * * * any persons who are not residents of the state, requiring in all cases of a non-resident of the state a bond with sufficient sureties, conditioned for the faithful discharge of the duties of the trust: Provided, that no person residing out of the state shall be appointed without the consent of the proper court,

as construed by the adjudged cases of

Plummer's Estate (supra) and
Coleman's Estate, 35 Pa. C. C. Rep. 625 (1908)

requires every non-resident trustee to give bond with sureties, and that the Pennsylvania statute of March 27, 1854 (P. L. 214, Sec. 1; 4 Purdon's Dig., 13th ed., 4929, Sec. 127), the relevant portion whereof follows:

In all cases where executors, administrators, assignees or other trustees, shall not reside within the jurisdiction of the court having control of their accounts, proceedings may be had and suits may be brought against them by creditors and others interested in said estates, in the counties where such accounts are to be settled, and process may be served * * * on said executors, administrators, assignees or other trustees, beyond the bounds of said counties * * * or upon any surety on their official bonds, with like effect as if they resided within the jurisdiction of the courts having control of their accounts,

provides that personal jurisdiction may be obtained over a non-resident trustee by service of process on his surety. That the legal effect of said provisions of law is to place in the custody of the Orphans' Court having jurisdiction all funds held by testamentary trustees and to establish a local situs for taxation purposes of
7 all intangible personalty thus held in trust.

That under the law of Pennsylvania the trust fund in

question still forms part of the estate of the testatrix, Matilda P. MacArthur, and if the trust should fail for want of takers, the fund would be distributed to and among the next of kin of the testatrix determined according to Pennsylvania law, as appears from the adjudged cases of

McDevitt's Appeal, 113 Pa. St. 103 (1886),
McCurdy's Appeal, 124 Pa. St. 99, 114 (1889), and
Conley's Estate, 197 Pa. St. 291 (1900);

and if in such case there were no next of kin, the beneficial interest would become vested in the Commonwealth of Pennsylvania, as appears from the adjudged case of

Linton's Estate, 198 Pa. St. 438 (1901),

and the Pennsylvania statute of June 7, 1915 (P. L. 878, #391). That said estate is not completely settled and distributed, by reason of the existence of powers of appointment to be exercised by the life tenants and of remainders over to persons unascertained or not in being in case of failure to exercise said powers. That the validity and effect of attempts to exercise these powers depend on Pennsylvania law and must be determined by Pennsylvania courts, as appears from the adjudged case of

Bingham's Appeal, 64 Pa. St. 345 (1870).

That the strict spendthrift provisions of said will are valid, binding and enforceable under the law of Pennsylvania.

3. That your complainant's income from said trust fund is specifically exempted from and made not subject to taxation by said
8 Chapter 269 of the General Acts of 1916. That as the principal of said fund is property having a permanent situs in Pennsylvania, the Fourteenth Amendment to the Constitution of the United States prevents the Commonwealth of Massachusetts from lawfully taxing the income thereof.

4. That nevertheless on or about May 15, 1917, the respondent assessed upon the share of the income of said fund so paid to your complainant in 1916 a tax at the rate of six per cent (6%). That your complainant, being aggrieved by said assessment, applied to the respondent for an abatement on or about September 5, 1917, and within three months after the date of the notice of the assessment. That the respondent refused to abate all or any part of said tax and that your complainant, being aggrieved by said refusal, appeals therefrom by filing this complaint within thirty (30) days after the notice by the respondent of his decision.

5. And your complainant prays that the entire tax assessed on her share of the income of the trust aforesaid—said tax amounting to twenty-nine and 98/100 dollars ($29.98)—may be abated; and for such other and further relief as may seem just to this Honorable Court.

By Her Attorneys, HALE, GRINNELL & SWAIM.

9 EXHIBIT A.

F. Income from Foreign Fiduciaries.

Income of any of the foregoing classes,—see particularly Sections C and D,—together with any business income, received by executors, administrators, trustees or other fiduciaries, none of whom is an inhabitant of Massachusetts or has derived his appointment from a Massachusetts court, and transmitted by them to you during 1916 or credited to your account, must be returned as follows for taxation:

Item 20. Taxable interest and dividends. (Taxable at six per cent).	$499.63
Item 21. Taxable gains from dealing in intangible personal property. (Taxable at three per cent).	none
Item 22. Net business income if the fiduciaries were carrying on a business. (Taxable at one and one-half per cent).	none
Item 23. Total amounts received. (Add Items 20, 21 and 22).	499.63

Do not include in above items payments to you of specific legacies or other payments of principal; include only payments of income.

The taxpayer's only income returnable under "F" was derived from a trust established by the will of a Pennsylvania testatrix and administered by a Pennsylvania trust company which has no place of business in Massachusetts. The taxpayer claims that the property constituting this trust fund is permanently situated outside Massachusetts and that the Fourteenth Amendment to the Constitution of the United States prevents taxation by Massachusetts of the income of said property. She therefore returns under protest the amount stated in Item 20 and denies that she is taxable thereon. Further explaining said Item, she alleges that $281.05 of the income therein returned is derived from intangible property owned by and legally taxed to a trustee under a testamentary trust in Pennsylvania, and claims that said portion of said income is specifically exempted from taxation by the provisions of Chapter 269, Public Acts of 1916. The remaining portion of said income ($218.58) is derived from intangible property exempted from taxation by the laws of Pennsylvania, which would be taxable by Massachusetts if within the jurisdiction of this Commonwealth.

10 B.

I nominate, constitute and appoint The Girard Life Insurance, Annuity and Trust Company of Philadelphia Executors of this my last Will and Testament and I give, bequeath and devise all my estate, real, personal and mixed of whatsoever kind and wheresoever situate to the said Girard Life Insurance, Annuity and Trust Com-

pany of Philadelphia In Trust Nevertheless for the following uses and purposes, that is to say In Trust to collect and receive the rents issue and profits, interest, dividends and income thereof and after paying therefrom all proper and necessary charges and expenses attending the execution of the trust then at the expiration of each and every period of three months during the continuance of the trust to divide the net balance of said rents, issues and profits, interest, dividends and income into four equal parts or shares and thereupon to pay over one such share to my son, Grayson P. McArthur, for and during the term of his natural life, one other such share to my daughter, Emily M. Maguire, wife of Mr. William M. Maguire, for and during the term of her natural life, one other such share to my daughter, Edith F. McArthur, for and during the term of her natural life and the remaining one other such share to my son, Charles P. McArthur, for and during the term of his natural life, such payments to be made not absolutely however but only in the manner following, to wit—as respects each of my said sons into his own hands upon his own order and receipt alone and free and clear of and without being subject to or liable to be affected by any transfer, assignment, alienation, anticipation or disposition by him and the same shall not be liable for any debts heretofore or which may
11 be hereafter contracted by him or to any lien, attachment or execution whatever, and as respects each of my said daughters into her own hands upon her own order and receipt alone and free and clear of and without being subject or liable to be affected by any transfer, assignment, alienation or disposition by her and the same shall not be liable for any debts heretofore or which may be hereafter contracted by her or to any lien, attachment or execution whatever, nor shall the same by any act become subject or liable or be made subject or liable to the debts, contracts or engagements of any husband she has or may have or take. And from and immediately after the decease of each of my said four children then In Further Trust to grant and convey, transfer, set over and assign one equal fourth part or share of the realty and personalty constituting the trust estate to such person or persons and for such uses and purposes as such child so dying shall or may by an instrument of writing in the nature of a last Will and Testament have directed, limited and appointed. And for want of such direction, limitation or appointment then In Further Trust to grant and convey, transfer, set over and assign freed and discharged from all trusts one equal fourth part or share of the said trust estate to the lawful issue (if more than one, to them in equal shares) of such child so dying and leaving such issue him or her surviving. But should any of my said four children die without leaving such issue and without exercising the power of appointment hereby conferred then In Further Trust to divide one equal fourth part or share of the said trust estate equally for the use and benefit of his or her surviving brothers and sisters and the issue
12 of any deceased brother or sister, such issue taking, and if more than one dividing among themselves equally, the share which would have been held for their parent if living, the purparts of such surviving brothers and sisters to be taken, kept and

held by the said Trustees in addition to and upon the same trusts as their respective original shares and the purparts of the issue of deceased brothers and sisters to be granted and conveyed, transferred, set over and assigned to such issue freed and discharged from all trusts. But if any of my said four children should die before me leaving lawful issue him, her or them surviving and who shall survive me then In Further Trust for the purposes hereinbefore set forth and provided as though such child or children so dying had survived me and thereafter died leaving issue. And in the event of any my said four children dying before me without leaving such issue then In Further Trust to augment the remaining shares held as hereinbefore in trust or for distribution by an equal division among them of the share of the child or children so dying and to hold such additions in the same manner and to like uses and purposes as before declared respecting the original shares.

13 SCHEDULE C.

Property Held and Income Received and Distributed During the Year 1916 by the Girard Trust Company as Trustee under the Will of Matilda P. MacArthur.

Securities Taxed Directly to Trustee by Commonwealth of Pennsylvania.

Name and amount.		Income.
$5000.	6% bonds Edmund J. D. Coxe	$300.00
2000.	5% 1st mortgage Choctaw & Memphis R. R. bonds	100.00
5000.	5.4% bond and mortgage Samuel Dempster, on land in Pittsburgh, Pa.	270.00
8000.	5% bond and mortgage Charles O'Neill, on land in Philadelphia, Pa.	200.00*
2000.	5.5% bond and mortgage David B. Lyman, Tr., on land in Chicago, Illinois	110.00
	Total income from taxable securities	980.00
Taxes paid to Pennsylvania	$87.84	
Trustee's commissions	49.00	
		136.84
	Total net income from taxable securities	$843.16
Complainant's share of this net income		$281.05

*This mortgagor was late in making his second semi-annual payment of $200.00 interest, and no part of this payment was received by the complainant during 1916.

14 Securities Not Taxed Directly to Trustee by Commonwealth of Pennsylvania.

	Name and amount.	Income.
$2000.	5% 1st mortgage bonds Central Iron & Steel Co. (includes $150 overdue interest)	$250.00
3000.	4% 1st mortgage bonds Mohawk & Moline Railway Co. (bought Aug. 16, 1916; net interest shown)	5.00
4000.	4% 1st mortgage bonds Philadelphia & Erie R. R. Co.	160.00
2000.	4½%, Series T, Southern Railway Equipment Trust (bought Aug. 16, 1916; net interest shown)	18.75
5 shs.	Frankford & Southwark Pass. Railway Co.	90.00
31 shs.	General Asphalt Co. preferred	155.00
	Interest on uninvested principal	11.49
	Total income from untaxed securities	$690.24
	Trustee's commissions hereon	34.51
	Total net income from taxable securities	$655.73
	Complainant's share of this net income	$218.58

Summary of Complainant's Income.

From securities taxed directly to trustee by Pennsylvania	$281.05
From securities not taxed directly to trustee by Pennsylvania	218.58
Total returned to Tax Commissioner	$499.63

Filed October 5, 1917.

Upon which complaint, the following order of notice issued to wit:

15 3. COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

In Superior Court, October 8, A. D. 1917.

Upon the petition aforesaid, it is ordered by the Court that the petitioner notify Tax Commissioner of the Commonwealth, to appear before our Justices of said Court, at Cambridge, in said County, on the first Monday of December next, by causing an attested copy of said petition and of the order of the Court thereon, to be served upon said Tax Commissioner, thirty days at least before said last mentioned day, that he may then and there show cause, if any he have, why the prayer in said petition set forth should not be granted.

WM. C. DILLINGHAM, *Clerk.*

4. COMMONWEALTH OF MASSACHUSETTS.
Middlesex, ss:

Superior Court.

EMILY M. MACGUIRE

v.

TAX COMMISSIONER OF THE COMMONWEALTH.

Respondent's Answer.

And now comes William D. T. Trefry, as he is Tax Commissioner of the Commonwealth, and for answer to the above entitled complaint says that he is informed and believes that all the allegations of fact, including all allegations as to the laws of the Commonwealth of Pennsylvania, therein contained are true.

And further answering, he says that no part of the tax described in the complaint was assessed without authority of law, and
16 that, accordingly, the complaint should be dismissed.

By WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

Filed November 6, 1917.

5. COMMONWEALTH OF MASSACHUSETTS.
Middlesex, ss:

Superior Court.

EMILY M. MAGUIRE

v.

TAX COMMISSIONER OF THE COMMONWEALTH.

Report.

In this case there is agreement as to all material facts. At the request and with the consent of the parties, without making any decision, I report the case to the Full Bench for determination upon the petition and upon the answer admitting the allegation of the petition.

JABEZ FOX,
Justice Superior Court.

November —, 1917.

We consent to and request the foregoing report.

WM. HAROLD HITCHCOCK,
Assistant Attorney General
for the Commonwealth.
HALE, GRINNELL & SWAIM,
For the Petitioner.

Filed November 13, 1917.

And thereupon the cause was entered in the Supreme Judicial Court for the Commonwealth. Afterwards, to wit: on the twenty-seventh day of June, A. D. 1918, the following rescript was
17 received from said Supreme Judicial Court as follows, viz:

6. *Rescript from Supreme Judicial Court for the Commonwealth.*

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, June 25, 1918.

In the Case of

EMILY M. MAGUIRE

vs.

TAX COMMISSIONER OF THE COMMONWEALTH,

pending in the Superior Court for the County of Middlesex.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz:

An abatement of the tax as assessed is granted in accordance with the terms of the statute in the sum of $16.86.

By the Court:

C. H. COOPER, *Clerk.*

June 25, 1918.

(The reasons of the decisions are set forth at length in the opinion filed herewith, to which reference is made.)

On the twenty-second day of July, A. D. 1918, the following finding in accordance with said rescript was entered by said Superior Court, to wit:

7. COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

In the Superior Court.

EMILY M. MAGUIRE, Complainant,

vs.

TAX COMMISSIONER.

18 *Finding of Superior Court Based Upon Rescript.*

In accordance with the direction in the rescript from the Supreme Judicial Court I find that the petitioner is entitled to an abatement of her tax in the sum of sixteen dollars and eighty-six cents ($16.86) with interest from the date of payment and costs.

CHARLES F. JENNEY, *J. S. C.*

I have no objection to the above being entered and approve the form but do not consent thereto.

WM. HAROLD HITCHCOCK,
Assistant Attorney General.

On the twenty-eighth day of October, A. D. 1918, the following motion for order for judgment was filed in said Superior Court, to wit:

8. COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

#31731.

MAGUIRE

v.

TAX COMMISSIONER.

Motion for Order for Judgment.

And now comes the complainant in the above-entitled action and moves that an order be made to enter judgment on the finding.

By Her Attorneys, HALE & DORR.

1918, October 28.—Motion allowed—Judgment to be entered for Complainant on finding on the first Monday of November next.

By the Court:

RALPH N. SMITH,
Asst. Clerk.

9. On the fourth day of November, A. D. 1918 judgment was entered on the finding for an abatement of complainant's tax in the sum of sixteen dollars and eighty-six cents with interest from the date of payment, and costs of suit taxed at seventy-eight dollars and seventy-eight cents.

10. COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

EMILY M. MAGUIRE, Complainant,

v.

WILLIAM D. T. TREFRY, Tax Commissioner of the Commonwealth, Respondent.

Application for Writ of Error.

To the Honorable the Chief Justice of the Superior Court:

Your petitioner, Emily M. Maguire, submits that heretofore, to wit, on the first Monday in November nineteen hundred and eighteen at Cambridge in an action by petition under chapter 269, section 20, of the General Acts of 1916 in which your petitioner was complainant and William D. T. Trefry, Tax Commissioner of the Commonwealth was respondent, final judgment was rendered in part adverse to your petitioner in the Superior Court within and for said County of Middlesex, being the highest court of law or equity of Massachusetts in which judgment could be rendered in said action, as appears by the record of said Superior Court. And your petitioner says that in the trial of said case there was drawn in question a right, privilege or exemption claimed under the Constitution of the United States and the decision so far as adverse to your petitioner was against the right, privilege or exemption claimed by your petitioner the complainant therein, and a manifest error hath happened to the great damage of your petitioner.

Wherefore, your petitioner considering herself aggrieved by the final decision of the Superior Court in rendering judgment in part adverse to and against her in the above entitled case, prays a writ of error from the said decision and judgment to the Supreme Court of the United States and an order fixing the amount of the bond to be filed by her.

Assignment of errors herewith.

By Her Attorneys, HALE AND DORR.

COMMONWEALTH OF MASSACHUSETTS:

Superior Court.

Let the writ of error issue upon the execution of a bond by Emily M. Maguire to the Tax Commissioner of the Commonwealth for five hundred dollars.

JOHN A. AIKEN,
Chief Justice of the Superior Court
of the Commonwealth of Massachusetts.

(Filed December 31, 1918.)

21 11. In the Supreme Court of the United States.

At Law.

EMILY M. MAGUIRE, Plaintiff in Error.

v.

WILLIAM D. T. TREFRY, Tax Commissioner of the Commonwealth of Massachusetts, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the plaintiff in error in the above named case, and says that there are errors in the records and proceedings of the above entitled case, and in the judgment of the Superior Court of Massachusetts for the County of Middlesex, and for the purposes of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

(1) That the said court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts, assessed and collected a tax upon the plaintiff's share of the income from (1) $2000 5% 1st mortgage bonds of the Central Iron and Steel Company, (2) $3000 4% 1st mortgage bonds of the Mohawk and Malone Railway Company, and (3) $4000 4% 1st mortgage bonds of the Philadelphia and Erie Railroad Company did not deprive the plaintiff of her property without due process of law or deny her the equal protection of
22 the law contrary to the provision of the Constitution of the United States, but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional, although the Girard Trust Company, a corporation foreign to the Commonwealth of Massachusetts and having no place of business therein, owned and held all said bonds as testamentary trustee, without the Commonwealth of Massachusetts and within the Commonwealth of Pennsylvania, subject to laws of said latter Commonwealth fully set forth in the complaint and specifically ad-

mitted by the answer, the plaintiff being merely the owner of an equitable and inalienable life interest in the trust fund of which said bonds were a part.

(2) That the said Court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts, assessed and collected a tax upon the plaintiff's share of the income from (1) five shares of Frankford and Southwark Passenger Railway Company and (2) thirty-one shares of the General Asphalt Company did not deprive the plaintiff of her property without due process of law or deny her the equal protection of the law contrary to the provisions of the constitution of the United States, but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional, although the Girard Trust Company, a corporation foreign to the Commonwealth of Massachusetts and having no place of business therein, owned and held all said shares as testamentary trustee, without the Commonwealth of Massachusetts and within the Commonwealth of Pennsylvania, subject to laws of said latter Commonwealth fully set forth in the complaint and specifically admitted by the answer, the plaintiff being merely the owner of
23 an equitable and inalienable life interest in the trust fund of which said shares were a part.

(3) That the said Court erred in said judgment and in the rendition thereof in this, that it decided as a matter of law that the statutes under which William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts, assessed and collected a tax upon the payments to the plaintiff, through the said Girard Trust Company, Trustee as owner of $2,000 4½% Series T Southern Railway Equipment Trust certificates, of rental for the use of tangible personal property having a situs outside the Commonwealth of Massachusetts, did not deprive the plaintiff of her property without due process of law or deny her the equal protection of the law contrary to the provision of the constitution of the United States, but that, on the contrary, said statutes and the assessment and collection of said tax were valid and constitutional, although the Girard Trust Company, a corporation foreign to the Commonwealth of Massachusetts and having no place of business therein, owned and held all said certificates as testamentary trustee, without the Commonwealth of Massachusetts, and within the Commonwealth of Pennsylvania, subject to laws of said latter Commonwealth fully set forth in the complaint and specifically admitted by the answer, the plaintiff being merely the owner of an equitable and inalienable right for her life to receive said rentals through said Trustee.

For which errors, the plaintiff, Emily M. Maguire, prays that the said judgment of the Superior Court be reversed, and that a judgment be rendered in favor of the plaintiff, and for costs.

By Her Attorneys, HALE AND DORR.

(Filed December 31, 1918.)

24 12 COMMONWEALTH OF MASSACHUSETTS:

Boston, January 2, 1919.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Emily M. Maguire vs. Commonwealth, decided on the 25th day of June, 1918.

HENRY WALTON SWIFT,
Reporter of Decisions.

RUGG, *C. J.*:

The petitioner, a resident of Cambridge in this Commonwealth, prays in accordance with St. 1916, c. 269, s. 20, for the abatement of a tax alleged to have been assessed illegally. The tax was levied upon income received during 1916 from a trust established by the will of a deceased resident of Pennsylvania. That trust now is and always has been administered at Philadelphia in that State by the Girard Trust Company, a Pennsylvania corporation having no place of business in Massachusetts, under appointment by a court of competent jurisdiction in that State. The trust fund consists of mortgages, stocks and bonds. All the securities, documents and other evidences of title of the property belonging to the trust at all times since its creation have been kept physically in the exclusive custody of the trustee in Philadelphia. Some of these securities were taxable and taxed to the trustee in Pennsylvania. The rest were not so taxed or taxable under the laws of Pennsylvania. Of these latter there were bonds of three corporations exempted from direct taxation to the trustee because the debtor corporations under a Pennsylvania statute paid to that State a tax for and in behalf of the
25 owners of the bonds. Certificates of the Southern Railway Equipment Trust were exempt from such taxation because all payments under them were rental for the use of tangible personal property, which in fact had a situs outside of Massachusetts, and shares of stock in two corporations were exempt from such taxation because the corporations paid to the State a tax on their capital stock.

The income received by the petitioner from the securities taxed to the trustee in Pennsylvania is not subject to taxation under our income tax law. It is provided by s. 9 of St. 1916, c. 269 (hereafter referred to as the income tax law), that "The income received by estates held in trust by trustees, any one of whom is an inhabitant of this Commonwealth or has derived his appointment from a court of this Commonwealth, shall be subject to the taxes assessed by this act to the extent that the persons to whom the income from the trust is payable, or for whose benefit it is accumulated, are inhabitants of this Commonwealth. The tax shall be assessed to such of the trustees as are inhabitants of the Commonwealth. Such part of the income of intangible personal property held in trust as is payable to or accumulated for persons who are not inhabitants of the Commonwealth, shall be exempt from the taxes imposed by this act. If an inhabitant of this Commonwealth receives income from one or more

executors, administrators or trustees, none of whom is an inhabitant of this Commonwealth or has derived his appointment from a court of this Commonwealth, such income shall be subject to the taxes assessed by this act, according to the nature of the income received by the executors, administrators or trustees." This section
26 standing by itself is broad enough to include the income in question. But this section must be read in connection with the other terms of the income tax law in order to gather the complete intent of the General Court. These broad provisions of s. 9 are cut down by s. 11. Reference is made in the earlier part of that section to the exemption from taxation under St. 1909, c. 490, of "property, whether held by an executor, administrator, trustee or otherwise," after the income tax law shall take effect; and a later sentence, so far as material, is in these words: "This act shall not be construed to impose a tax upon any * * * person in respect to income derived from property exempted from taxation by provisions of law existing prior to the passage of this act." It is manifest from the phraseology of s. 11 of the income tax law, that it was intended to apply to trustees so far as they may be within the general scope of any portion of it, because, as has been pointed out, they are named in the first part of the section.

The reference in the sentence quoted from s. 11, to the provisions of law existing at that time, manifestly is to the general tax law, St. 1909, c. 490, Part I, s. 23, cl. 5, as amended. It there was provided that "All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of April, except as provided in Part III and in the following clauses of this section: * * * Fifth, Personal property held in trust by an executor, administrator or trustee, except as provided in section thirty-seven of Part III, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the Commonwealth; and
27 if he resides out of the Commonwealth it shall be assessed in the place where the executor, administrator or trustee resides; and if there are two or more executors, administrators or trustees residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator or trustee is not an inhabitant of the Commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other State." The final sentence of that clause has direct reference to the taxation of trust property held by a foreign trustee for the benefit of a resident cestui que trust.

It is of no consequence in this connection that this sentence does not occur in Part I, s. 5 of the general tax law, which relates exclusively to exemptions of persons and property from taxation. It is none the less an exemption from taxation. It is described as "An act to exempt property * * * from double taxation" in the title of St. 1894, c. 490, by which it first became a part of our

statute law. The substance of the provision is an exemption from taxation. The purpose of this provision doubtless was to avoid duplicate taxation of the same property in two different sovereignties. It cannot be presumed that the same legislative purpose did not continue when the tax on incomes was substituted for certain other kinds of property tax. Moreover, s. 5 of Part I does not purport to include all exemptions, for other sections of the general tax law relate to the same subject. See, for example, Part I, ss. 6, 8, 16, 17, 19. The classification of exemptions in Watson v. Boston, 209 Mass. 18, 22, does not purport to be comprehensive. While the income tax law made a complete change in the basis of taxation of intangible property, there is nothing to indicate that it was designed to return to duplicate taxation of trust property even though it might be in degree less burdensome than was illustrated in Hunt v. Perry, 165 Mass. 287. No reason is perceived for narrowing the plain exemption of s. 11 of the income tax law and excluding from its operation the clear exemption of the final sentence of Part I, s. 23, cl. 5 of the general tax law. It is more consonant with the canons of statutory interpretation to construe the income tax law as a consistent and harmonious whole, the apparently absolute provisions of one section being modified by the equally explicit limitations of another section, than by construction to import into one section an exception which is not readily discernible there and which in this particular would involve recurrence to a kind of double taxation heretofore expressly discarded by the Legislature.

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The effect of s. 11 of the income tax law in connection with the final sentence of s. 23, cl. 5 of the general tax law, both already quoted, is that property held in trust in a sister State by a trustee there taxed therefor, is expressly exempt from taxation to the cestui que trust here resident. These lucid words are precisely applicable to circumstances like those here disclosed. There is no reason why these words should not be given their natural effect. A reason for this exemption under the existing income tax law is not far to seek. In the ordinary case of direct individual ownership of intangible securities there is no taxation except at the domicil of the owner, because in most instances taxation of that kind of property is based on the maxim mobilia sequuntur personam. There are some exceptions even to this rule. For instance, debts for purposes of taxation may under appropriate conditions have a situs at the residence of the debtor as well as of the creditor. Liverpool & London & Globe Ins. Co. v. Orleans Assessors, 221 U. S. 346, 354. So also may shares of stock in corporations by express statute have a taxable situs at the domicil of the corporation as well as at the residence of the shareholder. Corry v. Mayor & Council of Baltimore, 196 U. S. 466. Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51. But the general rule still obtains that intangibles have a taxation situs, and in practice usually their only taxation situs, at the residence of the owner. Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54. This being so, the imposition of an income tax such as is levied by our income tax law is based on the theory that the income tax is the only tax which in justice ought to

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be imposed in respect of such ownership, especially because in general the property represented by such intangibles contributes to the support of government in some other form. See Hawley v. Malden, 232 U. S. 1, 13 and Simplex Electric Heating Co. v. Commonwealth, 227 Mass. 225.

But the ownership of property held in trust in a sense is divided. The legal title is in the trustee, but the entire beneficial interest is in the cestui que trust. In such cases it is quite possible that the property may be taxed to the trustee as the legal owner in the State of his residence, regardless of the residence of the cestuis que trust. That has been our own law. Welch v. Boston, 221 Mass. 155. Crocker v. Malden, 229 Mass. 313. It doubtless was felt to
30 be inequitable in such instances to compel the cestui que trust to pay another tax to this Commonwealth. Although our statute is now changed in this respect by s. 9 of the income tax law, so that this Commonwealth no longer taxes the resident trustee for intangible personal property held for the benefit of non-residents, yet the reason for the exemption from taxation of the resident cestui que trust whose trustee, resident in another State, has there paid a lawful tax in respect of the trust property, still remains in principle. It is only in degree that its importance is diminished by the change in the scheme and rate of taxation.

This result receives some confirmation from the provision in the concluding paragraph of s. 5 of the income tax law, to the effect that "income derived from property not subject to taxation under chapter four hundred and ninety of the acts of the year nineteen hundred and nine and acts in amendment thereof and in addition thereto * * * shall not be taxed under this act." It is manifest from what has been said already that the property from which this income is derived was not subject to taxation under St. 1909, c. 490, Part I, s. 23, cl. 5.

The validity of the portion of the tax, assessed upon income from securities not taxable and not taxed to the trustees under the laws of Pennsylvania, must be considered next. It is not contended that income from this source is not taxable according to the terms of our income tax law. The position of the petitioner upon this branch of the case is that in this respect the income tax law is unconstitutional in that it operates to take her property without due process of law, and in other respects violates her fundamental rights.

31 It is plain that if the intangible property, legal title to which is held by the trustee in Pennsylvania, were owned in absolute ownership by the cestui que trust resident here it legally would be taxable to her here. That is settled so far as concerns the Constitution of this Commonwealth, by Hawley v. Malden, 204 Mass. 138, and the many cases there collected, and so far as the Federal Constitution is concerned, by the same case on writ of error in 232 U. S. 1. The question, whether the nature of the right of a cestui que trust in a trust held in a sister State is such as to be subject to taxation here, was before this court in Hunt v. Perry, 165 Mass. 287. In that case the beneficiary of a trust fund, created under the will of a deceased resident of Maine, held in that State by trustees there

resident and appointed by its courts, was taxed as a resident of this Commonwealth for her interest in the trust. It was said by Allen, J., speaking for the court (p. 291): "The statute under consideration rests on the ground that the cestuis que trust residing here have a beneficial interest in the trust fund which is valuable, and that they are in effect the equitable owners thereof. An interest of this kind is property, which the Legislature may subject to taxation. Bates v. Boston, 5 Cush. 93. Williston Seminary v. County Commissioners, 147 Mass. 127. Hathaway v. Fish, 13 Allen, 267. * * * The defendants contend that the statute, if such is its true construction, is unconstitutional. * * * This argument, however, is met by the suggestions already made, that the cestui que trust is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and
:32 allowed elsewhere, does not take away the power of the Legislature to subject the interest of the cestuis que trust to taxation here, if they live here." Other expressions are used in the course of that opinion, some of which cannot stand in the light of decisions of the United States Supreme Court in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, Delaware, Lackawanna & Western Railroad v. Pennsylvania, 198 U. S. 341, Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385, all rendered since Hunt v. Perry. But it does not seem to us that the soundness of the ground of that decision stated in the words quoted has been shaken by subsequent decisions. The exception to the general principle that personal property is taxable at the domicil of the owner seems to be rather strictly confined to chattels, live stock and other property which possesses a visible corporeal existence and which have acquired a manifest and permanent situs in another State. Southern Pacific Co. v. Kentucky, 222 U. S. 63. These decisions of the United States Supreme Court relied on by the petitioner do not appear to us to have wrought such ruin with the long established practice as to taxation in this Commonwealth as she contends. Indeed the soundness of the reasoning of the opinion in Hunt v. Perry, 165 Mass. 287, already quoted, appears to us to be sustained in principle by the most recent pronouncement of that court upon the subject in Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54. That case had to do with the validity of a tax assessed by a municipality in Kentucky upon one of its residents upon moneys deposited in a bank in Missouri, derived from business there conducted and standing to his
credit alone. It was conceded that these deposits were subject
:33 to taxation in Missouri. In the opinion upholding the validity of the tax in Kentucky it was said: "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that

whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. Kirtland v. Hotchkiss, 100 U. S. 491. See also Tappan v. Merchants' National Bank, 19 Wall. 490. * * * The notion that a man's personal property upon his death may be regarded as a universitas and taxed as such, even if qualified, still is recognized both here and in England. Bullen v. Wisconsin, 240 U. S. 625, 631. Eidman v. Martinez, 184 U. S. 578, 586. Attorney General v. Napier, 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in Kirtland v. Hotchkiss, supra, has been affirmed or assumed to be law in every subsequent case. * * * It was admitted to apply to debts in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone Tracy Co. 220 U. S. 107, 146, 162, et seq. Whichever this tax tech-
34 nically may be, the authorities show that it must be sustained."

That reasoning appears to us to be equally applicable to the facts here disclosed. State Tax on Foreign-Held Bonds, 15 Wall. 300. Metropolitan Life Ins. Co. of New York v. New Orleans, 205 U. S. 395, 399. Burke v. Wells, 208 U. S. 14, 23. Walker v. Jack, 31 C. C. A. 462 (88 Fed. Rep. 578). It is of no consequence in this aspect whether the tax is levied on income in truth received by the resident tax-payer from intangible property held for his benefit by a trustee resident in a sister State or on intangible property owned by the tax-payer but all in fact kept by him in a sister State. There is not apparent to us any difference in principle between the two cases.

It is clearly implied by what was said by Mr. Justice Gray in Dallinger v. Rapelloor Rapallo, 14 Fed. Rep. 32; 8 C. C. 15 Fed. Rep. 434, that a tax against the beneficiary in the State of his residence for his interest in a trust held by a non-resident trustee in one of the sister States of his residence would be valid. See also Putnam v. Middleborough, 209 Mass. 456, 457, and Brown v. Fletcher, 235 U. S. 589, 599. "Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest," Saving & Loan Society v. Multnomah County, 169 U. S. 421, 431, nevertheless it is plain that the debt with this equitable interest as security may be regarded for the purpose of taxation as situated at the domicil of the creditor. Kirtland v. Hotchkiss, 100 U. S. 491.

The trustee in Pennsylvania holds simply the legal title. He is possessed of the property in question solely for the benefit of the cestui que trust. The latter "is the real, substantial and bene-
35 ficial owner of an estate which is held in trust as distinguished from the trustee in whom the mere legal title is vested." Larkin v. Wikoff, 5 Buch. 462, 474, affirmed on this point in 7 Buch. 589. The cestui que trust has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or

irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. The tax here in question is a property tax. Tax Commissioner v. Putnam, 227 Mass. 522, 531, 532. Whether it be regarded as a tax on the right of the cestui que trust or a tax on the income as received, in either event a property tax is permissible. Of necessity a tax on income requires time as an element in its calculation. It must be levied on the income received during a period of time. It is not necessary that income be reinvested before it can be taxed. It may be spent as received and yet be subject to taxation. The contention of the petitioner in principle reaches much further than to the facts of the present case. In its logical application and extension it apparently would render invalid a tax on income from annuities, certificates in partnerships, associations and trusts and perhaps other sources, originating in sister States, and not having a place of business in this Commonwealth. Of course, if the principle is sound, its disturbing effect is no argument against its recognition and adoption. But a contention which in its results would seriously cripple the practical operation of any comprehensive
36 system of State income taxation has no presumption in its favor and ought not to be adopted except because of compelling considerations. We perceive no such requirement as to the tax here in controversy. Whatever may be the effect of Pollock v. Farmers' Loan & Trust Co. 157 U. S. 429, 581; S. C. 158 U. S. 601, and Brushaber v. Union Pacific Railroad, 240 U. S. 1, 16, 17, upon the nature of the tax here in question under the Constitution of the United States, no binding decision appears to us to require that this tax be declared invalid. There is nothing inconsistent with the conclusion here reached in Walker v. Treasurer & Receiver General, 221 Mass. 600.

The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in Bates v. Boston, 5 Cush. 93 at page 99. "The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after
37 it has been paid by the trustee" to the beneficiary.

Our income tax law is founded upon interstate comity in this regard. It taxes only residents of this Commonwealth in re-

spect of property in which they have a beneficial interest. It exempts resident trustees, although manifestly within the legal scope of its power, from taxation upon funds for the benefit of non-resident cestuis que trust. But it taxes resident cestuis que trust in respect of income actually received by them from trust property held in other States and not there taxed. This principle of taxation, just in itself and based upon recognition of like rights in sister States and manifestly aimed at the elimination of duplicate taxation upon the same property in different States, does not seem to us to violate any guaranty of the Fourteenth Amendment to the Federal Constitution.

No distinction in principle is manifest to us touching the income derived from the several classes of intangible securities held by the trustee and not taxed in Pennsylvania. See, in this connection, Hawley v. Malden, 232 U. S. 1, 13, and Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58.

An abatement of the tax as assessed is granted in accordance with the terms of the statute in the sum of $16.86.

So ordered.

38 13. All and singular which premises we have held good by the terms of these Presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

of our Lord one thousand nine hundred and nineteen.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Cambridge, this eighth day of January, in the year

[Seal the Superior Court.]

WM. C. DILLINGHAM, *Clerk.*

14. Know all men by these presents:

That we Emily M. Maguire, of Cambridge in the County of Middlesex as principal and Robert S. Hale of Boston in the County of Suffolk and Dudley H. Dorr of Lancaster in the County of Worcester as sureties are held and firmly bound unto William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts in the full and just sum of five hundred dollars ($500) to be paid to said William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts his successors or assigns, to which payment well and truly to be made we bind ourselves our Heirs, Executors and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the twentieth day of December in the year of our Lord one thousand nine hundred eighteen.

Whereas lately at a sitting of the Superior Court of Massachusetts for the County of Middlesex in a suit depending in said
39 Court between Emily M. Maguire complainant and William D. T. Trefry, Tax Commissioner of the Commonwealth, respondent judgment was rendered in part adverse to the said Emily M. Maguire and the said Emily M. Maguire having procured a writ

of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on Thursday, the thirtieth day of January next:

Now the condition of the above obligation is such, that if the said Emily M. Maguire shall prosecute her said writ of error to effect and answer all damages and costs, if she fail to make her plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

EMILY M. MAGUIRE. [SEAL.]
ROBERT S. HALE. [SEAL.]
DUDLEY H. DORR. [SEAL.]

Signed, sealed in presence of
R. W. HALE,
To R. S. H. & D. H. D.
JOHN M. MAGUIRE,
To Emily M. Maguire.

Approved:

JOHN A. AIKEN,
Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

The foregoing bond is hereby approved on behalf of the defendant in error.

WM. HAROLD HITCHCOCK,
Assistant Attorney General.

40 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

On this 20th day of December 1918, before me personally appeared Robert S. Hale, and Dudley H. Dorr to me known to be the persons described in the within bond and each acknowledged that he executed said instrument as his free act and deed.

[NOTARIAL SEAL.] RICHARD W. HALE,
Notary Public.

DISTRICT OF COLUMBIA,
City of Washington, ss:

On this 24th day of December 1918, before me personally appeared Emily M. Maguire to me known to be the person described in the within bond and acknowledged that she executed said instrument as her free act and deed.

[NOTARIAL SEAL.] H. B. LINTON,
Notary Public, D. C.

41 UNITED STATES OF AMERICA, *ss:*

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Cambridge, within and for the County of Middlesex, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Emily M. Maguire, Plaintiff and William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts, Defendants, in an action by petition to recover taxes paid under protest wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Emily M. Maguire, as by her complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the thirty first day of December in the year of our Lord one thousand nine hundred and eighteen.

JOHN E. GILMAN, JR.,
Deputy Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
JOHN A. AIKEN,
Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

42 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

And now, here, the Judges of the Superior Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court *Court*, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, William C. Dillingham, Clerk of said Superior Court have hereto set my hand and the seal of said Court this sixth day of January, A. D. 1919.

[Seal the Superior Court.]

WM. C. DILLINGHAM, *Clerk.*

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the City of Washington, D. C., on the thirtieth day of January next, pursuant to a writ of error filed in the Clerk's office of the Superior Court of the Commonwealth of Massachusetts for the County of Middlesex wherein Emily M. Maguire of Cambridge in the Commonwealth of Massachusetts is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts this thirty-first day of December, A. D. 1918.

JOHN A. AIKEN,
Chief Justice of the Superior Court,
Commonwealth of Massachusetts.

Approved as to form.

WM. HAROLD HITCHCOCK,
Assistant Attorney General.

44 EMILY M. MAGUIRE

v.

WILLIAM D. T. TREFRY, Tax Commissioner of the Commonwealth of Massachusetts.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the within citation and enter an appearance in the Supreme Court of the United States.

WM. HAROLD HITCHCOCK,
Assistant Attorney General.

Endorsed on cover: File No. 26,908. Massachusetts Superior Court. Term No. 822. Emily M. Maguire, plaintiff in error, vs. William D. T. Trefry, Tax Commissioner of the Commonwealth of Massachusetts. Filed January 24th, 1919. File No. 26,908.

Supreme Court of the United States.

October Term, 1919.

No. 280.

EMILY M. MAGUIRE,
PLAINTIFF IN ERROR,

v.

WILLIAM D. T. TREFRY,
TAX COMMISSIONER OF THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

CASES CITED.

Supreme Court of the United States.

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v.

WILLIAM D. T. TREFRY,
TAX COMMISSIONER OF THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Plaintiff in Error.

Statement of the Case.

This is a complaint seeking the abatement of an income tax assessed and collected in 1917 by the Commonwealth of Massachusetts. In the State Court the plaintiff in error sought a total abatement of $29.98. She presented two arguments.

The first was based entirely upon the interpretation of the Massachusetts statute. It was successful under the Massachusetts statute as it then stood before the repeals described on p. 42 of this brief, but

it went to part only of the abatement claimed, and, since these repeals, the rights which she seeks to maintain must stand or fall with the constitutional point. Record, p. 19. The amount ordered refunded was $16.86. Record, p. 23.

With respect to the remaining $13.12—and indeed with respect to the entire assessment—the plaintiff in error argued that the tax was exacted in violation of the Fourteenth Amendment to the Constitution of the United States. The State Court rejected this contention, and thus laid the basis for the present writ of error. Record, pp. 19-23.

The answer admits the allegations of fact in the complaint, including certain allegations as to the law of Pennsylvania, which in this cause is a question of fact. Record, p. 10.

The plaintiff in error is a resident of Cambridge, Massachusetts. The tax of which recovery is sought was imposed upon income derived from a trust under the will of her mother, Matilda P. MacArthur. The late Mrs. MacArthur was domiciled in Philadelphia, Pennsylvania, at the time of her death and her will was duly probated in the Orphans' Court of the County of Philadelphia. The Girard Trust Company, a Pennsylvania corporation having its usual place of business in Philadelphia, and not being an inhabitant of or having any place of business in Massachusetts, has at all times relevant hereto been Mrs. MacArthur's testamentary trustee. Record, p. 1. The securities composing the trust fund during the period covered by this proceeding are listed in schedule C annexed to the complaint. Record, pp. 8-9. All securities, documents, and other evidences of title belonging to or respecting

the trust have at all times been kept physically in Pennsylvania in the exclusive custody and control of the trustee. Record, p. 3. The law of Pennsylvania with respect to the handling and custody of trust funds requires a locally appointed testamentary trustee to keep his trust fund within Pennsylvania, no matter where the trustee himself resides, unless its removal is permitted by special order. Record, p. 3. Such a trust fund is subject to the Pennsylvania general property tax, irrespective of the residence of the trustee or the beneficiaries. Record, p. 3. The removal of a trustee from Pennsylvania is ground for his dismissal. Record, p. 4. A non-resident trustee must give bond with sureties, and personal jurisdiction over him may be obtained by service of process on his surety. Record, p. 4. The legal effect of these provisions is to establish a local *situs* for taxation purposes of all intangible personalty held under testamentary trusts. Record, p. 4.

The interest of the plaintiff in error in this trust fund consists of a right to one third of the income during her life. She has a power of appointment by will. In case of failure to exercise this power, there are limitations over. Record, pp. 1, 5, and 7. Under the law of Pennsylvania the fund still forms part of the estate of the testatrix. If the trust should fail, the fund would be distributed among the next of kin of the testatrix determined according to Pennsylvania law. Record, p. 5. If there were no next of kin, the beneficial interest would vest in the Commonwealth of Pennsylvania. Record, p. 5. The validity and effect of any attempt to exercise the plaintiff's power of appoint-

ment depend upon Pennsylvania law and must be determined by Pennsylvania Courts. Record, p. 5.

The State Court abated the tax assessed on the income of those securities taxed directly to the Pennsylvania trustee. But this was based solely upon the interpretation of the Massachusetts statute, which then contained a clause exempting property taxed elsewhere. This clause has now been repealed (see page 42 of this brief).

The court refused to grant any abatement which depended on lack of jurisdiction to tax, and hence refused abatement respecting the income of securities not so taxed by Pennsylvania. The securities included in this latter description fall into three classes (see Record, p. 9):

(1) Mortgage bonds of Central Iron & Steel Company, of Mohawk & Malone Railway Company, and of Philadelphia & Erie Railroad Company.

(2) Shares of capital stock in Frankford & Southwark Passenger Railway Company and in General Asphalt Company.

(3) Certificates of Southern Railway Equipment Trust.

The complaint explains the reasons for this real or apparent exemption from Pennsylvania taxation. Record, p. 2. We shall advert to these reasons in the course of our argument.

Specification of Errors.

The Court below erred—

First. In refusing to allow an abatement of the tax assessed by Massachusetts on or in respect of the in-

come derived by the plaintiff in error from securities not directly taxed by Pennsylvania to the trustee under Mrs. MacArthur's will.

Second. In not holding that the Massachusetts income tax act of 1916 violates the Fourteenth Amendment to the Federal Constitution if and so far as it levies a tax on or in respect of the income which the plaintiff in error derived from—

a. The shares of stock in the Frankford & Southwark Passenger Railway Company and in the General Asphalt Company;

b. The bonds of the Central Iron & Steel Company, of the Mohawk & Malone Railway Company, and of the Philadelphia & Erie Railroad Company; and

c. The Southern Railway Equipment Trust certificates—

all which securities were held in Pennsylvania by the trustee under Mrs. MacArthur's will.

Statement of the Issue.

The purpose of this case is to obtain a decision preventing double taxation of intangible personal property. It is a test case and the amount at stake is small, but the principle involved is an important one and the case stands between the decisions which have so far been rendered by this Court.

The issue is whether personal intangible property held in trust and personal tangible property held by a trustee who has leased it on the equipment trust plan

are property which can be the subject of taxation at the place where the *cestui que trust* resides. Our contention is that at least in this particular case such property has a *situs* where it is and where the trustee is and, as neither the property nor the trustee is in Massachusetts, that the domicile of the *cestui que trust* in Massachusetts does not authorize the taxation over again of the property itself.

It is part of the record and established by the nature of the Massachusetts tax rather than part of a contention now to be debated that the Massachusetts income tax here in controversy is a direct tax on the property the income of which is taxed by it.

Our contention upon the issue thus stated may then be subdivided and summarized as follows:

1. There is an existing principle that no state may directly or indirectly tax property which is not in its jurisdiction.

2. The Massachusetts constitution, statutes, and decisions assert and equally admit that the Massachusetts income tax is a tax on the property, the amount of tax being measured by the income.

3. The particular trust fund taxation of which is in controversy in this suit and all interests in it, both equitable and legal, have a fixed, permanent, and exclusive *situs* outside of Massachusetts for purposes of taxation. That *situs* is in Pennsylvania with the exception of the *situs* of the railroad equipment. The answer admits that the *situs* of the railroad equipment is outside of Massachusetts.

If the foregoing points are decided in our favor, it will follow that Massachusetts had no more power to

tax the property in this case than Kentucky had to tax the whiskey in—

Selliger v. *Kentucky*, 213 U.S. 200 (1909).

The judgment and opinion of the Supreme Judicial Court of Massachusetts appear to us to be erroneous upon the first and third points above stated. They appear to us to concede the second point above stated except that when the time comes for its application to the decision of this cause the consequences of the concession are not admitted.

As a test case this controversy involves in a double sense more than the amount of money sued for by the plaintiff. On the one hand it involves a principle of justice and raises the question to what point the injustice of double taxation may constitutionally be carried. On the other hand it involves an important economic question constitutional in the sense of statesmanship. We shall point out that the economic effects of a decision in favor of the tax in this case would be to break down the privileges which citizens of the United States have to move and own property freely in the different States regardless of their personal domicile. An important economic consequence of a decision in favor of the tax, as we say, would be to set forces in motion which will make it difficult and inexpedient for a man to own property outside of his own State. Such a result is so much to be deprecated that it furnishes a sound argument upon the constitutional privileges of the plaintiff and of others in like situations.

Brief of the Argument.

I.

No State may Directly or Indirectly Tax Property Which is Not in Its Jurisdiction.

This proposition, the keystone of our case, is divisible historically into two parts. It has never been doubted by any enlightened modern Court that if property was outside the boundaries of a given State, endeavors by that State to impose upon such property what we may call a tax *in rem* were doomed to failure. Admittedly Massachusetts could not tax Pennsylvania real estate, although owned by a Massachusetts resident. But until 1905 it was generally supposed that if John Smith of Massachusetts owned personal property in Pennsylvania, Massachusetts could, by virtue of its personal jurisdiction over Smith, levy upon him a tax measured by the value of the foreign personalty. The same supposition might well have been made in regard to real property. Indeed, the Commissioners' report for the Massachusetts Revised Statutes of 1836 does propose this very thing. But the fact that real estate is where it is was too trite to permit any development of so absurd an idea, and the Massachusetts Revised Statutes do not adopt the Commissioners' recommendation.

> See Massachusetts Revised Statutes, Commissioners' Report, c. 7, secs. 2, 3, 4, on page 25, and notes on the same, on pages 33, 34.

The common sense and penetration of these notes at such an early date is striking. The commissioners started a train of thought which must bring any mind

that works honestly to the conclusion that property which is outside a State cannot be made to be in it by calling it real or personal or equitable property.

Cf. Massachusetts Revised Statutes of 1836, c. 7, secs. 2, 3, 4—

in which the Legislature abandons the idea of taxing foreign real estate through the device of saying that it is the personal property of the owner situate at his residence.

But as to tangible and intangible personalty the Supreme Judicial Court of Massachusetts, asserting and admitting that there was no difference between them, enunciated in 1896 the very view that there was personal jurisdiction. See—

Hunt v. *Perry*, 165 Mass. 287, 291, 292 (1896)—

a case quoted with approval by the lower Court herein. Record, p. 20, top. Within ten years after *Hunt* v. *Perry* was decided—

Union Transit Co. v. *Kentucky*, 199 U.S. 194 (1905)—

demolished the old notion and established the just principle that an indirect attempt to tax foreign property was as repugnant to the Fourteenth Amendment as a direct attempt. The decision concerned tangible property only. There are two views about what is called intangible property. One school holds that, wherever the real values and things represented may be, there is always something taxable within the jurisdiction of the owner's domicile. The other school says that it is

a question of fact and realities, and looks to see what the facts and realities are in the given case. The views of the latter school are fairly exemplified by—

Louisville &c. Ferry Co. v. *Kentucky*, 188 U.S. 385, 396 (1903)—

which denied Kentucky the right to tax a domestic corporation *on or in respect of* a franchise granted by Indiana. We stand upon the principle manifested and established by this case. For purposes of convenience we transfer other citations and further argument to point III, subdivision 2, of this brief, commencing on p. 29 hereof. It will suffice to say here that under our contentions mere personal jurisdiction over the owner of an undivided equitable interest in the property which the complaint describes gives not the shadow of a right to tax that property.

As the argument unfolds, it will appear more and more fully that for *Union Transit Co.* v. *Kentucky* the present litigation is a challenge and a test. Income from funded wealth is of the same general nature whether it springs from realty or personalty, tangibles or intangibles. It is therefore the implied, if not the explicit, assertion of the Commonwealth of Massachusetts that the income tax is the magic solvent—the *aqua regia*—of all taxation problems which turn upon jurisdiction or *situs;* that whether or not the local tax collector can reach the *principal* of a resident's foreign property, he can always reach the *income;* that the just and equitable constitutional rule enunciated in 1905 is a mere scarecrow, unworthy the respect of any intelligent Legislature. We earnestly invite the Court's attention to the serious and radical nature of this as-

sertion and even at the risk of unnecessary repetition will continue to do so throughout the remainder of our brief.

We may say at this point that the claim we describe is no mere theory. Massachusetts today asserts by income tax "regulations" that her tax must be paid by her residents upon the royalties of Oklahoma oil wells. See Tax Commissioner's Rules and Regulations, No. 6049. It is true that this regulation refers to oil properties in general, and not specifically to foreign wells. But Massachusetts is not an oil-producing State.

II.

In Its Relation to the Federal Constitution the Massachusetts Income Tax should be Treated as if It had been a Tax Explicitly Imposed upon the Principal of the Trust Fund.

The subjects of taxation are three: persons, property, and business.

> State Tax on Foreign Held Bonds, 15 Wall. 300, 319 (1873).

This income tax might be a levy on the person, measured by income; or an excise imposed on the business (or privilege) of receiving income; or a property tax either upon the income itself or upon the principal of the trust. The Federal general income tax is an excise so far as it applies to citizens or residents.

> *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1, 16, 17, 19 (1916).

But it is plainly and necessarily a property tax so far

as it applies to the income accruing to non-resident aliens from their bonds and other securities in this country.

De Ganay v. *Lederer*, 250 U.S. 376 (1919).

Nor can the nature of a special income tax—and thus the Massachusetts levy must be classed—be determined by decisions concerning a general income tax only. Hence we must trace the legal history of the tax involved in the case at bar.

1.

Legal History of the Massachusetts Income Tax and Summary of Its Relevant Provisions.

The Massachusetts Constitution (part the second, c I, sec. I, art. IV) empowers the General Court or Legislature—

> "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

Under the first half of this clause a so-called general property tax was levied for many years upon both tangible and intangible property. This tax, when enforced against intangibles, was semi-confiscatory. It was usually avoided or evaded. During a long period of discontent and unrest several schemes were evolved for substituting with respect to intangibles something

in the way of an income tax. But the Supreme Judicial Court always stated that such a tax would not be a "duty" or an "excise" and would be a tax on property. As a property tax it was not proportional, and was therefore unconstitutional.

> *Opinion of the Justices*, 220 Mass. 613, 623 *et seq.* (1915).

It seems indisputable that under Massachusetts law an excise may not be levied upon the simple holding and ownership of property, or upon the passive receipt of income therefrom.

> *Gleason* v. *McKay*, 134 Mass. 419, 425 (1882),
> *Opinions of the Justices*, 196 Mass. 603, 620 (1908),
> *Opinion of the Justices*, 208 Mass. 616, 618, 619 (1911),
> *Opinion of the Justices*, 220 Mass. 613, 626 (1915).

Hard on the heels of the latest opinion above cited, and partially at least because of it, came the income tax amendment, approved and ratified by the people November 2, 1915. It reads as follows:

> "XLIV. Full power and authority are hereby given and granted to the general court to impose and levy *a tax* on income in the manner hereinafter provided. *Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes de-*

rived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be *exempted from the imposition and levying of proportional and reasonable assessments, rates, and taxes* as at present authorized by the constitution. *This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.*" (Italics ours.)

The italicized words, when compared with the older section of the Massachusetts Constitution already quoted, show clearly enough that the Forty-fourth Amendment authorized a property tax and not a duty or an excise.

We may now come to the income tax statute itself, which is—

General Acts of Massachusetts, 1916, c. 269.

As has been said, this is not a general income tax. Under it (1) income received by inhabitants (that is, residents) from stocks, bonds, notes, debts, money at interest, and the like is taxed at six per cent, subject to certain exceptions and deductions not here material; (2) income received by inhabitants from annuities, professions, employments, trades, and businesses is taxed at one and one half per cent; (3) net gains received by inhabitants from sales and purchases of intangible personalty are taxed at three per cent. Income of non-residents and income from other sources,

such as real estate and tangible personalty, is not taxed, and receives no attention whatever in the statute. The statute imposes three separate taxes, rather than a single general one. Quite probably the latter two are excises and thus dependent upon the original taxation clause in the constitution.

> *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531, 532 (1917).

This is a matter of no immediate concern, as the income here in question all falls within the first, or six per cent, class. Section 9 of the statute, under which the present assessment was made, provided in part that—

> "If an inhabitant of this commonwealth receives income from one or more executors, administrators or trustees, none of whom is an inhabitant of this commonwealth or has derived his appointment from a court of this commonwealth, such income shall be subject to the taxes assessed by this act, according to the nature of the income received by the executors, administrators or trustees."

Evidently "nature of the income received" means "nature of the property or source from which is derived the income received," for throughout the act taxability is determined by the nature of the source.

Section 11 provides that—

> "Property, whether held by an executor, administrator, trustee or otherwise, the income of which, if any, is taxed or would be taxable . . . if received by an inhabitant of this commonwealth,

> shall be exempt from taxation under the provisions"—

of the old general property tax law. This provision for substitution is significant. With respect to constitutional validity, a commutation tax normally steps into the shoes of the tax for which it is substituted, and stands or falls in any particular application by the same arguments which would have supported or overthrown the former tax.

> *McHenry* v. *Alford*, 168 U.S. 651, 671 (1898),
> *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U.S. 379, 387, 388 (1903),
> *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U.S. 132, 137, 138 (1918).

2.

That Portion of the Massachusetts Income Tax Here Drawn into Question has been Adjudged a Property Tax and Not a Personal Tax or a Tax on Business.

From the foregoing statement it plainly appears that the six per cent levy on income is a substitute for part of the former general property tax, and that it has always been considered a property tax itself. Such was the intimation in—

> *Tax Commissioner* v. *Putnam*, 227 Mass. 522 (1917)—

and the explicit holding in the case at bar. Record, p. 22, near top.

It would seem to follow that cases involving personal

taxes, duties, or excises have no direct application to the constitutional problem here raised.

Fidelity &c. Co. v. *Louisville,* 245 U.S. 54 (1917)—

is such a case. The tax there was "upon the person . . . for the general advantages of living within the jurisdiction." Yet it was this decision which the State Court used to clinch its points. Record, pp. 20-21, 23. We shall have occasion to refer again to *Fidelity Co.* v. *Louisville.*

There still remains one very serious obstacle to the clear understanding of this case. The Supreme Judicial Court explicitly refused to decide whether the "property" on which the tax impinges is the income as received or the beneficiary's interest in the trust principal. Record, p. 22. This refusal leaves us with the burdens of both alternatives and the benefits of neither. Had it been definitely decided that the income as received was the property taxed, our client could forthwith have arranged with the trustee to remit all income in the shape of Liberty Bonds and War Savings Stamps. We need not have carried the case to this Court at all. Or, if it had been definitely decided that the trust principal was the property taxed, the path to our present constitutional argument would be clear. We shall follow out both lines of argument later. Here we may remark that during the great body of discussion and legislative planning which preceded the birth of this tax every one thought the legislature was looking for a just tax *on the property.*

3.

Considered as a Property Tax, This Income Tax is Imposed on Principal Rather than on the Income as Received.

To this point we cite—

> *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429, 579 *et seq.*; 158 U.S. 601, 618, 628 *et seq.* (1895).

We are not unmindful of the fact that these cases are in matter irrelevant to the present discussion, somewhat modified by decisions concerning the various Federal income taxes since 1913. We submit that the modifications, if any, refer only to *general* income taxes and not to special forms of income tax the incidence and rate of which depend entirely upon discrimination between the kinds of principal from which income arises. These special taxes have adopted income merely as a convenient yardstick. They are plainly imposed upon the principal of selected types of investments. See—

> *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U.S. 326, 344, 345 (1887).

This seems never to have been doubted in Massachusetts before.

> *Opinion of the Justices*, 220 Mass. 613, 623, 624 (1915).

And see—

> *Hunt* v. *Perry*, 165 Mass. 287 (1896)—

which dealt with the old Massachusetts general prop-

erty tax as applied to a life interest in a trust fund. The fact that the interest was only for life appears in the printed report and is made more clear by the record and briefs in the Social Law Library at Boston. Now this "estate" was of course neither more nor less than a right to income. Such, indeed, are the customary words of limitation. Thus, for example, *Hunt* v. *Perry*, at p. 288, and the quotation from Mrs. MacArthur's will in the case at bar. Record, p. 7, near top. The Constitution of Massachusetts in 1896 required all property taxes to be proportional. If the tax in *Hunt* v. *Perry* was on income only, it exceeded in rate the general property levy and was not proportional. The Court held it valid and therefore accepted the proposition that it was in substance a tax on principal.

The most cogent argument of a purely legal nature against deciding for the defendant in error on this point is that a decision so based would practically nullify the important doctrine of—

> *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194 (1905).

For if the Massachusetts income tax respecting intangible personalty is a tax on the income as such when introduced into the jurisdiction, a similar State tax on the income of foreign realty and foreign tangible personalty would be equally valid and practicable. We cannot believe that this Court will lend its sanction to a theory which snatches the ground from under one of its most impressive recent decisions.*

* Our facts present the difficulty with peculiar emphasis. See the discussion of the effect of an income tax on the Southern Railway Equipment Trust securities, page 30, *infra*.

This argument is not rendered less forceful because the burden could be avoided, partly, at least, by causing income to be paid in the shape of securities which States have no power to tax. Taxpayers are entitled to convenient and direct justice, and should not be compelled to twist and turn through devious back alleys. And, to take the other point of view, something is fundamentally wrong with a tax which can be converted into a laughing stock.

4.

Irrespective of Its Technical Nature, This Tax must be Deemed One in Substance Imposed on the Trust Principal.

We believe that in almost any State other than Massachusetts this Court would have to decide as a new question whether this tax was a levy on the person, measured by income. The point might be so decided as to provide a simple explanation of the whole matter, implying no contradiction of Mr. Chief Justice WHITE's definition of an income tax as an "excise." The Federal power of taxation is plenary and the Constitution is so worded that in it the term "excise" is a catchall for taxes which would elsewhere be defined simply as personal.

> *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1, 12 (1916),
>
> *Thomas* v. *United States*, 192 U.S. 363, 370 (1904).

But where a State has or claims jurisdiction over both the property and the person, it may of course de-

cline to extend the personal power beyond those cases where it can also exercise its power *in rem*. This seems to be what Mr. Chief Justice RUGG thinks Massachusetts has done, despite the fact that her taxes on personalty do not receive support from liens and do, so far as residents are concerned, impose personal liabilities.

Certain it is that the constitutional grant of power "to impose . . . assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying, within said commonwealth" must be read in the light of the ancient practices. Until the enactment of the income tax in 1916, the method of taxing personal property in Massachusetts had remained essentially what it was during the early colonial days. And it is undeniable that the old laws distinguish persons and chattels when authorizing assessments. For example, in "The General Laws and Liberties of the Massachusetts Colony: Revised and Re-printed By Order of the General Court Holden at Boston, May 15th, 1672" under the heading "Charges Publick" appears on pages 22 and 23 the following provision:

> "and the Lands and Estates of all men (wherein they dwell) shall be Rated . . . where the Lands and Estates shall lye, and their persons where they dwell."

Also a provision for the listing:

> "of all the Male persons in the same Town from sixteen years old and upwards, and a true estimation of all personal and real estates, being or reputed to be the estate of all and every the persons in the same Town, or otherwise under their cus-

> tody or managing . . . all which Persons and Estates are . . . to be assessed and rated as here followeth, *viz.* every Person aforesaid (except Magistrates and Elders of Churches) *one shilling and eight pence* by the head, and all Estates, both real and personal, at *one penny* for every *twenty shillings* . . ."

These laws resulted at first in the assessment of all personalty where the owner was domiciled. But in 1743 certain property of merchants, traders, and factors carrying on business in towns other than those of which they were inhabitants was submitted to taxation at the business *situs*.

> *Hittinger* v. *Westford*, 135 Mass. 258, 260 (1883),
> *Boston Loan Co.* v. *Boston*, 137 Mass. 332, 335 (1884).

Several like exceptions have since been made. In particular, it is arguable that trust property has long been taxed *as* property because it has not been consistently associated with the person of either the trustee or the *cestui*. See p. 28 hereof.

If the Attorney-General desires to elaborate the idea that we are really dealing with a tax on the person, he is within his rights. But if Mr. Chief Justice Rugg is right when he calls the income levy a property tax, we submit that every word in his opinion about the personal advantages of dwelling in Massachusetts and all such arguments are irrelevant and should be disregarded. When a State tries to assess property as such, all these issues go by the board. The single

question to be answered is: Has the taxing power jurisdiction over the *res?*

Fortunately, perhaps, we need not press to the bitter end this point of definition. In constitutional matters this Court gazes keenly through forms to substance. States may not attain forbidden ends by using cloaked and disguised means. We could load our brief heavily with citations of cases sustaining this general proposition and applying it to problems of taxation. We prefer to cover the whole point with—

> *International Paper Co.* v. *Massachusetts* 246 U.S. 135 (1918).

Now the Federal income tax decisions of 1895 settled once and for all that no matter what the technical nature of an income tax is, United States Courts will treat it as a property tax whenever it is employed to overcome prohibitions placed between the taxing power and property from which income arises. It was said in—

> *Flint* v. *Stone Tracy Co.,* 220 U.S. 107, 150 (1911)—

that the income tax of 1894 was direct "because it was imposed upon property simply because of ownership." Property is not protected unless the protection covers every fruit of passive ownership. So far as the application of this rule goes, there is not the slightest difference in principle between the famous income tax cases of 1895 and the case at bar. Our complaint is merely based upon another part of the Constitution—the Fourteenth Amendment. "Nullification by indirection" will fail just as surely when aimed at the due-

process clause as when aimed at the clause requiring apportionment of Federal direct taxes.

As we have said, no State could ever tax property beyond its jurisdiction. *Union Transit Co.* v. *Kentucky* advanced a step, and held that, where a property tax would fail for lack of jurisdiction over the *res*, a tax pretended to be on the person but measured by such property likewise fails. The Massachusetts income tax as here applied is not an excise. Even if it is a tax *on* income or a personal tax, it is invalid unless the principal from which the income emanates lies within the taxing jurisdiction of Massachusetts.

Authority seems to be with us on the point, and there is no need to go back to first principles. We cannot, however, refrain from remarking that if the problem were one of novel impression, a practical argument would lie within easy reach. For if technically this be not a property tax, then Massachusetts' legislators and Courts have been misled since about the middle of the seventeenth century. A distinction so subtle and elusive certainly should not prejudice the practical rights of a litigant.

The State Court rather exaggerated the consequences of this conclusion, seeming to fear that in identifying income with principal for taxing purposes we advanced a theory which would exempt for an unreasonable time property received by way of income. (Record, p. 22, sentence commencing in ninth line from top of page.)

> *Dyer* v. *Melrose*, 197 Mass. 99 (1908), aff. 215 U.S. 594 (1910)—

states the exact rule for which we contend. Massachu-

setts could not tax Admiral Dyer's salary *as* salary, but when any sum had been paid by the government and come into the Admiral's possession, it lost its identity as salary, and became money, effects, or credits liable to taxation under the general law. So with our client's income from Pennsylvania. *After* she received it, it ceased to be income and became taxable as new principal. This does not sustain the present tax. The new principal was intangible personalty—a cheque—and this was assessable only at a rate measured by the income, if any, which it in turn produced. Record, p. 2; this brief, p. 15.

The State Court quoted with approbation from—

Bates v. *Boston*, 5 Cush. 93, 99 (1849).

See Record, p. 22. The quotation appears to us thoroughly inapposite. It is simply a foreshadowing by Chief Justice Shaw of *Dyer* v. *Melrose*. The tax in *Bates* v. *Boston* was a general property tax and not an income tax. It does seem that the great chief justice made the mistake of not assessing the received income as independent principal. He approved a tax which was much too high. In—

Loring v. *Beverly*, 222 Mass. 331 (1916)—

the assessment was made accurately.

The foregoing discussion illuminates this passage from the *Union Transit Co.* opinion:

> "True, a resident owner may receive an income from such property," (*i.e.*, tangible personalty in another state) "but the same may be said of real estate within a foreign jurisdiction. Whatever be

> the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived." (199 U.S., at 204.)

The reference must be to the payments after they have been reduced to possession within the new jurisdiction and have thus lost their evanescent character as income. The mere arrival of property within the bounds of a State has little or no bearing upon the right to tax it directly or indirectly. What fixes that right is the continuance of the property in such a place and under such legal circumstances that it enjoys protection from the local sovereign. For example, it has been stated with the greatest emphasis that when a foreign testator leaves foreign personal property to a local beneficiary, the jurisdiction of the beneficiary's domicile cannot impose a succession tax. It does not matter that the property so donated is handed across the State line to the new owner, although of course it can *thereafter* be locally taxed like other assets of a similar nature.

State v. *Brim*, 57 N.C. 300 (1858).

To much the same effect are—

Hood's Estate, 21 Pa. St. 106, 115 (1853).
Hay v. *Fairlie*, 1 Russell, 117, 128 (1826).

A considerable number of other English cases accord with *Hay* v. *Fairlie*. It is interesting, and perhaps not without significance, that the two decisions last cited referred to gifts of income, *Hood's Estate* involving legacies "payable out of the crops of a sugar planta-

tion in Cuba," and the *Hay* case involving remittances of interest on an investment held in India.

III.

This Trust Fund and All Interests in It have a Fixed, Permanent, and Exclusive Situs Outside Massachusetts for Purposes of Taxation.

No argument is needed to prove that all legal interests in the trust securities are inside Pennsylvania, or at least outside Massachusetts. One further assertion is also safe. If a life tenant residing in Massachusetts exercised a testamentary power of appointment over either the corpus or the income of the fund, Massachusetts could not reach the transfer even with the long arm of an inheritance or estate tax.

Walker v. *Treasurer and Receiver-General*, 221 Mass. 600, 602 (1915).

The facts in the *Walker* case came so close to ours that we ventured the following paraphrase of part of the opinion:

> "In the instant case the property is actually in the Commonwealth of Pennsylvania. Its title is vested in the trustee resident there. Both its physical and constructive *situs* is in the Commonwealth of Pennsylvania. Massachusetts has no control of either the property or its owner."

But the State Court curtly denied the relevance of these remarks in the present connection. Record, p. 22. We submit, however, that a person of common sense, thinking reasonably in matters of substance, would have a

right to be astonished if he were told that the mere creation of a trust could make one thing into two things or several things so that one hundred dollars' worth of taxable property would thereby become two hundred, or three hundred, or four hundred dollars' worth of taxable property according to the number of different States and countries where persons with beneficial claims could be found.

1.

Theory and Practice of Trust Taxation.

The taxation of trusts historically involves assessment of the legal estate. The clumsy-fingered tax gatherer of the older days could not grasp so elusive a thing as an equity. He sought out the property and the legal owner, and there levied his charge.

Trinity College in Cambridge v. *Browne*, 1 Vernon, 441 (1686);
Hall v. *Bromley*, 35 Ch. Div. 642, 655 (1886);
Latrobe v. *Baltimore*, 19 Md. 13 (1862).

Indeed—

Watson v. *Boston*, 209 Mass. 18 (1911)—

where the exemption from taxation of the property of charities was held to cover equitable as well as legal estates, seems based upon the fact that there is but one taxable interest in a trust. Whether the tax is laid nominally on the trustee or the *cestui* is a matter of procedural convenience. *Watson* v. *Boston* shows that from 1651 to 1828 Massachusetts assessed trust property to the trustee; from 1828 to 1860, to the *cestui;* from 1860 to 1911, in some cases to the trustee and in

others to the *cestui;* but *never* to both at the same time. At all times this tax apparently stood either on actual physical jurisdiction over the *res* or on the maxim that *mobilia personam sequuntur.* The Court, in the case last cited, refuses to accept the conclusion which would flow from counsel's argument that the Massachusetts tax on personal estate was not *in rem,* but "purely one *in personam.*" 209 Mass., at 20 and 24.

2.

It is a Misconception to Think That the Situs of the Trust Property can be Held to be in a Place because a Life Tenant of the Trust Property (the Plaintiff in Error) is Domiciled There.

Only such a misconception can support the present decision. The maxim concerning the adherence of personalty to its owner has been riddled with exceptions. We need not refer in any great detail to those which affect tangible property. We feel quite certain that Massachusetts would no more think of trying to tax an equitable interest in a Pennsylvania freight car than she would of trying to tax the legal ownership thereof. A distinction is sought to be drawn, however, because we are here dealing with intangibles. Record, p. 20.

This distinction invites us to emphasize the character of the trust securities. They are—

Stocks, represented by certificates;
Corporate bonds;
Equipment trust certificates.

We have omitted from the assignment of errors the

taxation of the small amount of interest accrued on uninvested capital. While we think that the validity of this part of the tax depends upon the general arguments advanced by our brief, we are not entitled under the writ of error to claim that it should be refunded.

The stock certificates are "constituents" and "more than evidence" of title.

Hatch v. *Reardon*, 204 U.S. 152, 161 (1907).

The bonds, under ancient and well-recognized usage, tangibly embody the obligations described in them. The specialty character of an instrument is not always conclusive on the question of *situs* for taxation, but coupled with other considerations, it may have such substantial weight as to turn the scale. See—

Kennedy v. *Hodges*, 215 Mass. 112 (1913).

Even more significant is the nature of the Southern Railway Equipment Trust certificates. Their precise description for the purposes of this suit is to be found in the admitted allegations of the complaint:

> "That the certificates of the Southern Railway Equipment Trust were exempt" (from Pennsylvania taxes) "because all payments of interest or principal to the owners of said certificates were payments of rental for the use of tangible personal property having a situs outside the Commonwealth of Massachusetts and as rental were non-taxable under the laws of Pennsylvania." Record, p. 2.

The Massachusetts income tax, as applied to this rent, practically flies in the teeth of the *Union Transit Company* decision. If the income tax is sustained, it was

a sheer waste of intellectual effort to call unconstitutional the tax measured by the property.

The Court below seemed inclined to treat the Equipment Trust certificates as if they were independent assets apart from the equipment to which they pertain, just as corporate stock is entirely distinct from the property of the same corporation. Record, p. 23. This higher Court has, however, recently recognized the great difference between trusts, associations, and corporations, with respect to the taxable interests of *cestuis*, associates, and stockholders.

Crocker v. *Malley*, 249 U.S. 223 (1919).

A fortiori, there is a similar clean-cut distinction between the cases of stockholder and lessor. So, with respect to the creation of an independent taxable credit, a lease has been distinguished from a mortgage.

Kraay v. *Gibson*, 15 Ohio Dec. 323 (1904); s.c. 17 Ohio Dec. 218 (1906).

Other factors unite with the peculiar character of these trust securities to give them a *situs* for taxation beyond the reach of Massachusetts. If the right of a State to tax a resident legal owner of promissory notes held outside the State is at all doubtful, it would seem quite certain that, where both the specialty itself and the legal owner are outside the taxing jurisdiction, any attempt to assess the equitable owner should fail. When it was said that—

> "The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile

of the owner as the proper situs for purposes of taxation"—

> *Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63, 76 (1911)—

the legal owner is surely referred to. Here the holder of legal title is in Pennsylvania and is there duly taxed. Supplementary foreign taxation of an equitable part owner raises the same "attendant difficulties" and the issue of injustice to boot. *Southern Pacific Co.* v. *Kentucky* certainly did not mean to encourage the idea of double or multiple *situs*. Besides, it is misleading to say that credits and other *choses in action*, except possibly when represented by specialties which the obligee holds, are normally taxable at their owner's domicile because they have a *situs* there. They are property; they are taxable; but, being incorporeal, they have no *situs* anywhere. Their taxable value consists in the power which they give over the person and estate of the obligor. Consequently, jurisdiction for taxation is found at the place where that power is controlled. Usually, this is the obligee's domicile. But, as has been said by Mr. Justice HUGHES—

> "The legal fiction expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere."
>
> *Liverpool &c. Ins. Co.* v. *Orleans Assessors*, 221 U.S. 346, 354 (1911).

If the verb "yield" means anything, it means that the jurisdiction of the owner—here the equitable owner merely—*loses* something which the jurisdiction of

actual control *gains*. The phrase of the learned justice is not a chance combination of words. It has a legal history. Disregarding many more recent adjudications, we find it in—

> *Green* v. *Van Buskirk*, 7 Wall. 139, 150 (1868)—

and still earlier, flowing from the pen of Story, who says the fiction about personalty—

> "*Yields* whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined."
>
> Story on Conflict of Laws, sec. 550.

We say, first, that this would be such a case if the fiction came into play at all; and, second, that the conjunction of legal ownership with physical custody anchors the securities in Pennsylvania—determines their *situs* both actually and under the fiction—thus ousting Massachusetts entirely.

We cite as analogous on our first point:

> *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U.S. 395, 399 *et seq.* (1907),
> *Burke* v. *Wells*, 208 U.S. 14 (1908),
> *De Ganay* v. *Lederer*, 250 U.S. 376 (1919).

The foregoing decisions asserted the right to tax the domestic credits or securities of a foreign owner. A refusal to tax the foreign credits of a domestic owner is rarer, because it calls for self-sacrifice. But such cases are in the books, two of the best coming from

Kentucky, which has had so much to do with the development of the law on this point.

People, ex rel. Hoyt, v. *Commissioners*, 23 N.Y. 224, 240 (1861),
Commonwealth v. *West India &c. Co.*, 138 Ky. 828 (1910).
Commonwealth v. *B. F. Avery & Sons*, 163 Ky. 828 (1915).

See also—

Leavell v. *Blades*, 237 Mo. 695 (1911),
Robinson v. *Dover*, 59 N.H. 521 (1880).

The typical case of this kind concerns a foreign agent with liberal powers of control. Our Pennsylvania trustee has every power of control. The *cestui* has no legal relation to the obligors. She cannot sue to enforce their bonds or to foreclose their mortgages or to obtain the equipment rental.

At this point we turn again to *Fidelity &c. Co.* v. *Louisville*, cited on page 17 of our brief. While the tax there was a personal one, some of Mr. Justice Holmes' observations apply to property taxes, and it appears that the modern rules governing the validity of the two kinds of levies are largely similar. We have no quarrel with the decision, whether the assessment was on property or on the person. The *res* was assumed to be a simple *chose in action*, legally owned and entirely controlled by the taxpayer, and unattached to any foreign business. There was no dominion by a non-resident agent.* The three reports of the case be-

* So eminent an authority on conflict of laws as Professor Beale concludes from this decision that "under no circumstances will the doctrine of *Union Refrigerator Transit Co.* v. *Kentucky* be applied

low indicate that little if any attention was paid the constitutional point in the Kentucky Courts. It seems, indeed, the last desperate expedient of a defeated litigant. Our facts are distinguishable in every respect. The cited decision presents the weakest imaginable situation for sustaining foreign *situs;* we present the very strongest.

Judicial control is also an important factor in fixing *situs.* A judgment has a *situs* where rendered.

> *Board of Commissioners* v. *Leonard,* 57 Kans. 531, 535, 536 (1896).

The pleadings describe the present fund as part of an estate being administered by a Pennsylvania Court. Record, p. 5. Foreign taxation of intangible property so controlled is not favored.

> *Putnam* v. *Middleborough,* 209 Mass. 456 (1911).
> *Newcomb* v. *Paige,* 224 Mass. 516 (1916).
> *Kinehart* v. *Howard,* 90 Md. 1 (1899).
> *Lewis* v. *County of Chester,* 60 Pa. St. 325 (1869).

The present chief justice of the Supreme Judicial Court of Massachusetts stated in—

to a tax on intangible property." 32 Harv. Law Rev., at 593. But if we correctly interpret his remarks, he wrongly assumes that the bank deposits in question had a foreign "business situs." That was not so. The deposits "were not used in the business and belonged absolutely to" the taxpayer. 245 U.S., at 57. Hence we refuse to let Professor Beale's conclusion depress us. In this connection we observe with interest the same writer's later statement that "it is clear that promissory notes are now regarded as tangible for the purpose of taxation." 33 Harv. Law Rev., at 8. He cites to this point *Austin* v. *Great Southern L. T. Co.,* 211 S.W. (Tex. Civ. App.) 482 (1919). Our difficulties vanish almost completely if such things as notes and bonds are deemed chattels.

Gardiner v. *Treasurer & Receiver-General*, 225 Mass. 355, 372 (1916)—

that it is unquestionably within the power of a Legislature to establish a local *situs* for taxation purposes of all intangible personal property held by trustees under local wills, appointed by local Courts. This is precisely what Pennsylvania has done. Allegations in complaint (Record, pp. 3-5) admitted by answer (Record, p. 10), and more briefly summarized in the statement of the case (pp. 2-4, *supra*).

3.

The Cestui que Trust has an Estate, Not a Bare Right of Action.

We have thus far assumed that a *cestui que trust* has an actual interest in the trust fund itself. We think that neither the Massachusetts Courts nor this Court would repel that assumption. What was originally a mere power to affect another's conscience has by usage and the passage of time hardened into property. The earlier cases are collected and elaborately discussed in Huston on the Enforcement of Decrees in Equity, pp. 87 *et seq.* We add some further citations. A *cestui's* assignee may sue the trustee in the Federal Courts on the ground of diverse citizenship, although the *cestui* himself is a citizen of the same State as the trustee.

Brown v. *Fletcher*, 235 U.S. 589, 599 (1915).

Local statutes of limitation do not usually discharge *choses in action;* they simply bar the local remedy. Yet it seems clear that if a vendor of land or any other

trustee, constructive or express, contrives to start running against his vendee or beneficiary the statute of limitations of the jurisdiction where the *res* is, he will by the complete running of that statute gain a perfect title, good anywhere.

Currier v. *Studley,* 159 Mass. 17, 22, *et seq.* (1893).

Sawyer v. *Cook,* 188 Mass. 163 (1905), land.

Freeman v. *Baldwin,* 13 Ala. 246, 252 (1848), personalty.

Massachusetts has held "that an equitable estate in land lying outside of the commonwealth, although owned by one domiciled in the commonwealth at the date of his death, is not subject" to Massachusetts' succession duty.

Dana v. *Treasurer and Receiver-General,* 227 Mass. 562 (1917).

See also—

Kinney v. *Treasurer and Receiver-General,* 207 Mass. 368 (1911).

All the more certainly, no property tax can reach such an interest.

4.

Even were the Cestui Remitted to a Personal Right Only, the Decision should be in Her Favor.

We need not flinch from the alternative proposition that trusts now, as at their inception, create only rights *in personam ad rem. Choses in action* are normally taxable at the obligee's domicile. But this is not a

typical or normal *chose in action*. To begin with, no action will lie on it in Massachusetts. Any suit there would be defeated by an important consideration peculiar to testamentary trusts and those established by decree of Court. Such trusts, if created or recognized by, and administered under the supervision of, a foreign tribunal, "cannot be enforced in this Commonwealth, although the trustee personally resides here."

Jenkins v. *Lester*, 131 Mass. 355, 357 (1881).

Protection and payment of taxes are correlative obligations.

Union Refrigerator Transit Co. v. *Kentucky*, 199 U.S. 194, 202, 204 (1905).

A State can no more tax an intangible right which it refuses to protect than it can tax a tangible chattel which it is unable to protect because the chattel is beyond its jurisdiction.

It is urged that Massachusetts protects the plaintiff in error in the receipt of her income. Record, p. 22. Not so. The laws of Pennsylvania and of sundry other States shield the income as it arises, and the Federal Constitution covers its transmission by cheque through the channels of interstate commerce. As a matter of fact the trust company might under the will require the beneficiary to come to its office in Philadelphia to receive payments. Record, p. 7. Clearly, Massachusetts' protection does not attach until after the remittances lose their character as income and merge with the local *corpus* of the recipient's property.

Massachusetts lacks even brute power over the

cestui's right. Its Courts could not compel an assignment to her creditors. There is a valid spendthrift provision in the will. Record, pp. 5 and 7. The fact that Pennsylvania can permit and sustain such a restriction irrespective of Massachusetts' views and desires shows how utterly this *res* is beyond Massachusetts' jurisdiction.

The present facts resemble, and are stronger than, those of the famous warehouse-receipt-and-barrel-of-whiskey case.

> *Selliger* v. *Kentucky*, 213 U.S. 200, 205-206 (1909).

The *trustee* is not a debtor of the beneficiary. The *res* of this trust is the exclusive debtor. The "debt" which it owes is situated where the *res* is. If legal title did not draw the whiskey to its owner, it would seem clear that a fractional equitable interest does not so draw these specialty intangibles away from both their physical *situs* and the person to whom they legally belong.

IV.

The Practical Future Effects of a Decision in the Plaintiff's Favor will be Good, Not Evil.

The problem behind this case is a severely practical one, and the Supreme Judicial Court of Massachusetts was right in explaining and fortifying its conclusion by reference to the consequences of the reverse decision. But the Court did not accurately forecast these consequences, and we may with profit devote a portion of our brief to their further consideration.

It is asserted that acceptance of our contention 'would seriously cripple the practical operation of any comprehensive system of State income taxation.'' Record, p. 22. If this means that Massachusetts ought not to lose the power to levy an income tax equivalent both in rate and total amount to the present tax, no objection can be raised. The trouble with the theory of assessment of which we now complain is that it practically imposes a property tax on property over which the State has no control. The necessary result is inequality and injustice, for we cannot expect foreign jurisdictions to forego realizing upon sources of revenue which are legally within their power. Our client pays two taxes, one in Pennsylvania and one in Massachusetts. If Massachusetts will but return to the sound fundamental principle of taxing all income emanating from property within her jurisdiction, whether payable to residents or non-residents, she will obtain at least as much revenue without adding to the existing inequalities of interstate taxation. Moreover, her revenue will be honestly earned, for it will arise from property which she really protects.

It is possible, though, that the learned chief justice meant to claim for Massachusetts the power to tax all income either arising within her boundaries or paid from foreign sources to any of her residents. If so, we are at issue with him. We deny that such power exists or should exist. Its assertion results from a misconception of the status and rights of the commonwealths composing our Federal Union. The United States, being a nation, may tax all its citizens on all their property wherever located.

United States v. *Bennett*, 232 U.S. 299, 304-307 (1914),
United States v. *Goelet*, 232 U.S. 293, 296, (1914).

Although an American resides abroad and has no holdings in this country, he owes our government a debt. That government will protect him or his belongings anywhere on earth, by diplomacy if possible, by force of arms if necessary. It may even be that the United States is not in any aspect of taxation restricted by problems of *situs*.

United States v. *Erie R.R. Co.*, 106 U.S. 327, 703, 704, (1882).

But our States are not nations. They have no diplomatic corps. They have neither armies nor navies. Their powers stop short at their boundaries. They deserve no equivalent for foreign protection, which they cannot render.

The State Court pronounced a homily with respect to the justice of this income tax, and particularly with respect to the feature of comity manifested by it. Record, pp. 22-23. We have slight confidence in comity. Governments are too urgently in need of money nowadays. Wisconsin and Missouri pay little attention to comity. New York gives non-residents only a partial exemption.

Income Tax Cases, 148 Wis. 456, 470, 516 (1912);
Laws of Missouri, 1917, pp. 524 *et seq.*, sec. 1;
Laws of New York, 1919, c. 627, sec. 363.

Comity in taxation is a poor reed to lean on. We prefer the Federal Constitution.

Occurrences connected with the case at bar fully justify our scepticism as to exemptions which rest upon comity. The State Court by implication at least denounced the injustice of taxing foreign trust property which had already paid for protection in the jurisdiction of physical *situs*. Record, p. 19. But that did not touch the heart of the Legislature, which has promptly committed this very injustice. The exemption rests on Acts 1909, c. 490, part I, sec. 23, cl. 5, as incorporated in the income tax act by Gen. Acts 1916, c. 269, sec. 11 and sec. 5. Record, pp. 17-19. After the commencement of our suit, but before its decision, section 23, above referred to, was so mangled by an amendment that clause 5 vanished entirely. See Gen. Acts 1918, c. 129. The gentleman who was then income tax deputy gave an opinion that our client and others in her position had lost their exemption. Later a new income tax deputy was appointed. He reversed the ruling. But then the 1919 Legislature revised section 11 of the income tax act so that it no longer extended any exemption to our client. Gen. Acts 1919, c. 349, sec. 4. It will be observed that section 5 of the income tax still remains intact. We have informally made the claim that this protects us; the defendant rejects our claim by Ruling 11031 (Revised) of his January, 1920, Rules and Regulations. The difference of opinion has little importance. The Legislature of Massachusetts has shown a sufficient tendency to do what the Supreme Judicial Court says comity should prevent it from doing.

Irrespective of this legislative tinkering, it is only

fair to state that our client is not endeavoring to avoid *all* taxation. To be sure, the securities involved in the present controversy are not explicitly taxed to the trustee. But Pennsylvania's tax in respect of the bonds was substantially a tax on the individual bondholder. Record, p. 2. And the shares of stock are exempt only because the corporations pay taxes. Record, pp. 2-3. The rolling stock covered by the equipment lease is unquestionably taxed. Exemptions are not matters of free gift in these times, or else are likely to be more apparent than real.

One fear must have lain in the State Court's mind which the opinion does not mention. The good faith of our client cannot be doubted. She had nothing to do with the establishment of the trust in Pennsylvania. The idea of evading Massachusetts taxation is nowhere manifest. But will not a decision in her favor encourage and assist persons who do have such ideas? We answer that honest and above-board avoidance of double taxation is not illegal or unconscionable or dishonorable. One may properly change his domicile or move his belongings to secure more favorable conditions. The question, in cases where no trickery or concealment is concerned, is simply whether the taxpayer has actually done the things necessary to carry himself or his property beyond the reach of the taxing statute.

Bullen v. *Wisconsin*, 240 U.S. 625 (1916).

Suppose that, this case having been decided in our client's favor, some inhabitant of Massachusetts creates a trust of intangibles and places it in another State and claims exemption from income tax respect-

ing them. If it is found that he has fully and genuinely relinquished control of the securities, his claim should be sustained. If he still remains in substance the *dominus*, able to direct the disposition and management of the property, he should be defeated. It is purely an evidential question. Any rascal can manufacture imitation evidence, but we must trust the Courts to see through a fraud. It was said below that there is no difference between taxation of income from foreign intangibles owned by the taxpayer and of income from such property held in trust for the taxpayer. Record, p. 21. We reply that the vesting of legal title in an independent trustee is always weighty, and often conclusive, evidence of an honest shift of control; and that in the present case the phrase "held for the taxpayer's benefit by a trustee" is used by the Court in such a sense as to beg the question. It implies that the taxpayer is the equitable owner of the property taxed. A spendthrift life tenant is not the equitable owner of the fee.

Fifteen years ago it was reasonable enough to be harsh in taxing intangible property, because it could be held secretly.

> *Union Transit Co.* v. *Kentucky*, 199 U.S. 194, 205 (1905).

Such harshness was never justified with respect to testamentary trusts, where, as in Pennsylvania, the securities composing them could be and were subjected to the Court's scrutiny. Nor is it nowadays justified with respect to any intangible property. The income tax has dredged even safe-deposit vaults to their very bottoms.

So far our practical comments have been mainly defensive. We wish to advance one or two of a different character.

The plan which Massachusetts hails as embodying interstate comity is all too likely to have the effect of turning each State into an investment-tight compartment. Every out-of-State investment will run the risk of double taxation. To a certain extent this can never be avoided, but any rule of law which increases the embarrassment bears a highly unfavorable aspect. Internal harmony and uniform national development can be best attained without artificial barriers against the free flow of capital from one State to another.

We have discussed and criticized the legal theory which would cause a multiplication of taxable units to arise from the mere creation of trusts. This brief, p. 27. We considered only the case where the trustee was in one State, the beneficiary in another. But suppose they are in the same State. Will not the multiplication equally occur? Assuredly, if the theory is at all valid. But, as a matter of fact, no State will levy on a domestic trust two or three income taxes and two or three property taxes. The visible presence in the State of property, trustee, and beneficiary make the substance so plain that the particular injustice is not likely to happen.

The breach of decency is too obvious and flagrant. It follows, then, that a decision that there are two or three kinds of property in such a case can never be used and will never be used except to deny the citizens of one State the substantial privileges and immunities of citizens of another State. But—

"The parts are not greater than the whole,

whether the beneficiary and the trustee are, or are not, separated by a state line."

Robinson v. *Dover*, 59 N.H. 521, 526 (1880).

Conclusion.

Mr. Justice Holmes has said that—

"In states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

McDonald v. *Mabee*, 243 U.S. 90, 91 (1917).

This brief is an earnest appeal for realism and justice in taxation. A tax on principal and a tax on income are normally identical in practical effect, for it is one of the coldest and hardest of cold, hard facts that all productive property must pay out of income every tax levied upon it. It is equally a fact that only the power which protects property deserves compensation for protection. And, finally, it is clear that the highly specialized *choses in action* which compose the corpus of this trust are definitely and permanently located in other jurisdictions than Massachusetts. When that Commonwealth seeks to impose the equivalent of a property tax on these securities its action savors rather of extortion than of just assessment.

Respectfully submitted,
RICHARD W. HALE,
JOHN M. MAGUIRE,
Of Counsel for the Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1919

No. 280

EMILY M. MAGUIRE, PLAINTIFF IN ERROR

v.

WILLIAM D. T. TREFRY, TAX COMMISSIONER OF THE COMMONWEALTH OF MASSACHUSETTS

In Error to the Superior Court for the Commonwealth of Massachusetts

BRIEF FOR DEFENDANT IN ERROR

WM. HAROLD HITCHCOCK
Attorney for Defendant in Error

J. WESTON ALLEN
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SUBJECT INDEX.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error seeking to reverse a judgment of the Superior Court of Massachusetts, entered pursuant to a decision of the Supreme Judicial Court (230 Mass. 503), denying in part a claim for the abatement of an income tax assessed upon the plaintiff in error and paid by her under the Massachusetts Income Tax Law (St. 1916, c. 269). The proceedings is a statutory one under that statute (§§ 19 and 20). The

plaintiff in error will be referred to in this brief as the petitioner.

The tax in question, amounting to $29.98, was assessed in 1917, at the rate of 6 per cent, upon certain interest and dividends, of a character taxable under the Income Tax Law, received by the petitioner in 1916 from the Girard Trust Company of Philadelphia, Pennsylvania, as trustee under the will of Matilda P. MacArthur, late of Philadelphia. The petitioner was a beneficiary under a trust established by the will of this decedent and, as such, entitled to the income received by her. The testatrix died prior to January 1, 1916, and her will was duly probated and the Girard Trust Company appointed trustee by the Orphans' Court of the County of Philadelphia, conceded to have jurisdiction in the premises.

About one-half of the property held in this trust in 1916 was directly taxed to the trustee by the Commonwealth of Pennsylvania. The petitioner's share of the net income from these securities amounted to $281.05. The remainder of the fund thus held was not directly taxed to the trustee by Pennsylvania. The bonds of three corporations, namely, the Central Iron and Steel Company, the Mohawk & Malone Railway Company and the Philadelphia & Erie Railroad Company, were exempt from taxation to the trustee because, under a statute of Pennsylvania, these corporations paid to that state a tax for and in behalf of the owners of these bonds. The certificates of the Southern Railway Equipment Trust were exempt from taxation in Pennsylvania to the trustee because all payments under them are regarded as rental for the use of tangible personal property and

thus are non-taxable under the laws of Pennsylvania. The shares of stock in the Frankford & Southward Passenger Railway Company and the General Asphalt Company were exempt from taxation to the trustee under the laws of Pennsylvania because these corporations paid to that state, under its laws, a tax upon their capital stock. This is regarded as a tax on their capital invested in the state and not as a tax on the shares owned by individuals. The petitioner's share of the income from these securities not taxed to the trustee was $218.58. The documents representing these securities were all in the possession of the trustee in Pennsylvania and the trust was necessarily being administered there under the laws of that state.

The Tax Commissioner assessed the tax in question at the statutory rate of 6 per cent upon all the above-described income received by the petitioner. The Massachusetts Court interpreted the Income Tax Law as exempting from taxation income received from property directly taxed to the trustee in Pennsylvania, and therefore ordered an abatement and a refund of that portion of the tax which was assessed upon income from property thus taxed. The balance of the tax, that is, that assessed upon or on account of the income of property not taxed in Pennsylvania to the trustee, was sustained against the contention of the petitioner that it constituted a taking of her property without due process of law in violation of the Federal Constitution.

QUESTION AT ISSUE.

The Massachusetts Income Tax Law imposes a tax at a uniform rate of 6 per cent upon all income received by inhabitants of that state from certain speci-

fied classes of intangible property (§ 2). It expressly imposes that tax upon income of the character taxed by the act received by inhabitants of the Commonwealth from trustees in other states (§ 9). By the same section it exempts from taxation income received by Massachusetts trustees for the benefit of inhabitants of other states.

Thus narrowly stated, the sole question presented by this record is whether, under the Federal Constitution, it is within the power of a state to extend a uniform tax of this character to income received by its own inhabitants from testamentary trustees, resident in other states, appointed by and accountable to the courts of such other states, and keeping none of their securities in Massachusetts, at least to the extent that the property producing the income is not taxed to the trustees in their own state.

Broadly stated the question is whether it is within the power of a state to impose an income tax upon its own inhabitants based upon the income received by them from property held for their benefit by trustees entirely within the jurisdiction of other states.

ARGUMENT.

I.

Jurisdiction to tax Personal Property.

The general principles at the basis of the jurisdiction to tax personal property are too well settled by the recent decisions of this Court to be seriously in doubt.

It is a fundamental rule that *mobilia sequuntur personam*. Thus it follows that the sovereign of the domicil of the owner of personal property has juris-

diction to tax that property, whatever its character or wherever it or the documents evidencing it are situated.

Kirtland *v.* Hotchkiss, 100 U. S. 491.
Blackstone *v.* Miller, 188 U. S. 189.
Hawley *v.* Malden, 232 U. S. 1.
Bullen *v.* Wisconsin, 240 U. S. 625, 631.

The principle has more recently been stated by this Court in Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54. There the question was as to the right of Kentucky to tax the bank deposits of one of its citizens in a bank in another state, where they were also taxable. It was said: —

"The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this Court that whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. Kirtland *v.* Hotchkiss, 100 U. S. 491. See also Tappan *v.* Merchants' National Bank, 19 Wall. 490. The notion that a man's personal property upon his death may be regarded as a universitas and taxed as such, even if qualified, still is recognized both here and in England. Bullen *v.* Wisconsin, 240 U. S. 625, 631. Eidman *v.* Martinez, 184 U. S. 578, 586. Attorney-General *v.* Napier, 6 Exch. 217. It has been carried

over in more or less attenuated form to living persons, and the general principle laid down in Kirtland *v.* Hotchkiss, *supra*, has been affirmed or assumed to be law in every subsequent case. . . . It was admitted to apply to debts in Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 205. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint *v.* Stone Tracy Co., 220 U. S. 107, 146, 162 *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained."

The only exception to this rule was established by this Court in Union Transit Co. *v.* Kentucky, 199 U. S. 194, where it was held that if tangible personal property is permanently located elsewhere than at the domicil of the owner, it is taxable where thus located, and it is beyond the power of the state of the domicil to impose a tax upon it.

This rule is confined to cases where tangible property has actually acquired a permanent situs elsewhere. It is based upon the fact that such a permanent situs has been acquired, and not upon the fact that the property is not actually within the state of the domicil. Thus, if it has not acquired such a permanent situs, the property is taxable by the jurisdiction of the domicil of the owner, even though it is not within that state and has never come within it.

> Southern Pacific Co. *v.* Kentucky, 222 U. S. 63.

Certain evidences of indebtedness, such as, bank notes, because of their analogy to coin; bonds, because of their character and history (New Orleans *v.* Stempel, 175 U. S. 309, 322; Sellinger *v.* Kentucky, 213 U. S.

200, 204), and perhaps, also, promissory notes (Buck *v.* Beach, 206 U. S. 392; Wheeler *v.* New York, 233 U. S. 234), partake of the nature of tangible property and are taxable where permanently kept, independent of the domicil of the owner.

Apparently the rule of Union Transit Co. *v.* Kentucky is not to be applied to this class of property. Items of this character are still to be regarded as debts, and thus choses in action, even though, by usage or otherwise, the obligation is regarded as so inseparable from the paper upon which it is printed or written that it is capable of having an independent situs of its own. But a destruction of the paper does not today discharge the obligation, and the intangible chose in action, independent of the paper, still exists and follows the person of the creditor. Debts of this sort thus really have a dual character. While partaking of the nature of tangible property to such an extent that they may acquire a situs of their own, they are still choses in action subject to the jurisdiction of the domicil of their owner. For purposes of taxation they are thus subject to the power of both jurisdictions. Either the state where they are found or the state having jurisdiction over the owner, or both, may treat them as within its taxing power.

Kirtland *v.* Hotchkiss, 100 U. S. 491.
Bonaparte *v.* Tax Court, 104 U. S. 592.

Other forms of personal property are held to come within the taxing jurisdiction of states other than that of the domicil of the owner, but for quite different reasons than that they have acquired any element of tangibility.

A series of credits arising from business transactions entered into within a state by a non-resident is held taxable as representing capital actually employed in a local business. The business, so to say, has a situs within the jurisdiction.

Liverpool, etc., Ins. Co. *v.* Orleans Assessors, 221 U. S. 346.
Metropolitan Life Ins. Co. *v.* New Orleans, 205 U. S. 395.
New Orleans *v.* Stempel, 175 U. S. 309.

Bank deposits and other simple contract debts are subject to inheritance and transfer taxes at the domicil of the debtor on the ground that the law of the residence of the debtor gives validity to the debt, and that thus "power over the person of the debtor confers jurisdiction to tax."

Blackstone *v.* Miller, 188 U. S. 189.
Bliss *v.* Bliss, 221 Mass. 201.

Probably for the same reasons such debts are also subject to a property tax at the domicil of the debtor, "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor."

Blackstone *v.* Miller, at p. 205.

"The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay: and power

over the debtor at his domicil is control of the ordinary means of enforcement."

Liverpool, etc., Ins. Co. *v.* Orleans Assessors, 221 U. S., at p. 354.

Mortgages of real estate are subject to taxation in the jurisdiction where the land lies independent of the domicil of the mortgagee, on the ground that the tax is imposed on the interest of the mortgagee in the land, and thus clearly upon property actually situated within the jurisdiction.

Savings Society *v.* Multnomah County, 169 U. S. 421.

Kinney *v.* Treasurer and Receiver-General, 207 Mass. 368.

Hawkridge *v.* Treasurer and Receiver-General, 223 Mass. 134.

But it is equally well settled that the jurisdiction of the domicil of the mortgagee may also impose a tax upon the mortgagee as a part of his personal property.

Kirtland *v.* Hotchkiss, 100 U. S. 491.

Then for reasons hereinafter pointed out (*infra*, p. 18) it is established that shares in corporations are taxable both at the domicil of the shareholder and at that of the corporation.

In Fidelity & Columbia Trust Co. *v.* Louisville, *supra*, this Court expressly refused to extend the exceptions created by Union Transit Co. *v.* Kentucky, *supra*, to intangible property, even in cases where

because of its character such property had become subject to taxation in a state other than the domicil of the owner. In that case, the bank deposits in question were assumed by the Court to be taxable in the state where the bank was located. Yet, it was held that they were also taxable in Kentucky where the depositor had his legal residence.

An examination of all these cases makes it plain that they each involve personal property which has a dual nature or character and which thus may be regarded by the jurisdiction seeking to tax it in whichever character the exercise of its taxing power requires. This is plainly so in the case of a note or bond secured by a mortgage of real estate. The mortgagee has an actual interest in the land by virtue of his mortgage, and, therefore, that interest is clearly taxable by the jurisdiction where the land lies. The mortgagee also, by virtue of his note, is the owner of a chose in action, a debt of a plainly intangible character which follows his person and is thus taxable by the jurisdiction where he is domiciled.

The cases from Louisiana, sustaining taxes upon a series of credits arising from business transacted within the state, are another illustration of the same principle. In all of them the notes or credits taxed were regarded as representing the value of capital employed by a non-resident in a local business. The tax was imposed not upon the notes or debts, as such, but upon the capital invested in the state, its value merely being measured by the notes or credits. It is plain that these notes or credits would also be taxable at the domicil of the creditor, since they were also admittedly choses in action which followed the person

of the creditor and were subject to the jurisdiction of his domicil. There is no suggestion in these cases otherwise.

A dual character of the same sort exists in the case of all obligations between citizens of different jurisdictions. As the obligation can be enforced only where the debtor can be found, power over the debtor confers power over the debt, and thus jurisdiction to tax. But the debt is also property, though of an intangible character, in the hands of a creditor, and thus power over the creditor also gives power over the debt and jurisdiction to tax.

It is submitted that in all cases where personal property is subject to taxation in two jurisdictions, it will be found that the property in question has such a dual nature that it is subject to the authority of the two jurisdictions. Either may deal with it from the side of its nature which justifies the imposition of a tax. Tangible property, however, has an independent existence of its own and cannot have any such dual character. It can be actually permanently situated in but one jurisdiction, and cannot be subject to the power of more than one sovereign. Accordingly, when it has acquired an actual situs independent of the domicil of its owner, the latter of necessity loses jurisdiction over it, and, accordingly, has no power to tax.

II.

Application of the Foregoing Principles to the Taxation of Property held in Trust.

(*a*) *The Nature of the Right of the Beneficiary of a Trust.*

Story thus defines a trust: —

"A trust in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits, or charges constitute the trusts, which courts of equity will compel the legal owner, as trustee, to perform in favor of the *cestui que trust*, or beneficiary."

2 Story's Equity Jurisprudence, § 964.

In other words, courts of equity recognize the legal title of the trustee in the trust *res*, but require him, because of the obligation which he has voluntarily assumed or which those courts consider is imposed upon him by his relation to another, to hold and use that estate or title strictly for the benefit of that other. Except where their powers have been enlarged by statute, courts of chancery enforce these obligations solely by controlling or directing the action of the owner of the legal title by means of decrees *in*

personam directed to him, never *in rem* by control of the property itself.

Thus, the equitable rights of the beneficiary of a trust are strictly *in personam*, or, with more accuracy, *in personam ad rem*. If a court of equity ever does more in enforcing a trust than to direct the trustee to act with reference to the trust *res*, it must be by some power conferred upon it by a positive statute, and not by any power developed in the exercise of its historic jurisdiction.

It follows that the right of the beneficiary of a trust is purely a right *in personam*, a right that an individual trustee act in his ownership of property in a specified way.

Professor Langdell thus analyzes rights of this character: —

"There are, however, true equitable rights, and also true equitable wrongs, the latter being violations of equitable rights. A true equitable right is always derivative and dependent, *i.e.*, it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part. Such a right may be defined as an equitable personal obligation. It is an obligation because it is not ownership; and because it is relative, *i.e.*, it cannot exist without a correlative duty; and it is personal because the duty is imposed upon the person of the owner of the *res* (*i.e.*, of the legal right), and not upon the *res* itself. And yet courts of equity frequently act as if such rights were real obligations, and even as if they were ownership. Indeed, it may be said that they always so act when they can thereby render the equitable right more secure and valuable, and yet act consistently with the fact that such right is in truth only a personal obligation. For example, a personal obligation can be enforced only against

the obligor and his representatives; but an equitable obligation will follow the *res* which is the subject of the obligation, and be enforced against any person into whose hands the *res* may come, until it reaches a purchaser for value and without notice. In other words, equity imposes the obligation, not only upon the person who owned the *res* when the obligation arose, but upon all persons into whose hands it afterward comes, subject to the qualification just stated. But the moment it reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership. Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person, — *aequitas agit in personam*. One reason is (as has already appeared) that equity has no choice or option as to admitting this limitation upon its jurisdiction. Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which would not only be intolerable to those for whose benefit equity exists, but would be especially abhorrent to equity itself. Upon the whole, it may be said that equity could not create rights *in rem* if it would, and that it would not if it could".

Langdell, Equity Jurisdiction, p. 5.

As Professor Langdell points out, courts of equity often act as if equitable rights constituted ownership of property; but, as he also points out, they indicate plainly that such rights are not ownership when they at once cease to regard them as such upon the appearance of a bona fide purchaser for value. In fact, when a court of equity talks about an equitable interest in property, it is merely applying in a special case its

maxim, "that is done which ought to be done." As the beneficiary ought to own the property or an interest in it, the court assumes that he does so own it so long as no higher equity arises. In that case, as in the case of a bona fide purchase for value, it is no longer equitable to make the assumption, and so it is abandoned. In truth, it always was an assumption.

The argument is in no wise affected by the opposing views as to the historical origin of uses. Whether they be regarded as the creation of chancery procedure or an improvement of an idea borrowed from the early German law, their character in modern times is the same. Mr. Justice Holmes, in his essay on Early English Equity, thus concluded his argument for the latter view: —

"If the foregoing argument is sound, it will be seen that the doctrine of uses is as little the creation of the subpœna, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with. It is true, however, that the form of the remedy reacted powerfully upon the conception of the right. When the executor ceased to intervene between testator and devisee the connection between devises and uses was lost sight of. And the common law courts having refused to protect even actual pernors of profits, as has been explained, the only place where uses were recognized by that name was the Chancery. Then, by an identification of substantive and remedial rights familiar to students, a use came to be regarded as merely a right to a subpœna. It lost all character of a *jus in rem*, and passed into the category of choses in action. I have shown elsewhere the effect of this view in hampering the transfer of either the benefit or burden of uses and trusts."

2 Select Essays in Anglo-American Legal History, 716.

For the last-mentioned discussion, see Holmes, The Common Law, pp. 407–409. It is there pointed out that the difficulty of transferring a mere right, which was so strongly felt in the early days of the law, was applied to uses and trusts, and that in the days of Queen Elizabeth all the judges of England held that a trust could not be assigned "because it was a matter in privity between them and was in the nature of a chose in action".

The freedom with which courts of equity will enforce trusts of land situated beyond their jurisdiction, when they have acquired jurisdiction over the trustee, clearly illustrates the nature of the interest of the beneficiary.

Kildare *v.* Eustace, 1 Vern. 419.
Massie *v.* Watts, 6 Cranch, 148.
Gardner *v.* Ogden, 22 N. Y. 327.

Upon precisely the same principle, specific performance will be decreed of a contract to convey land not within the territorial jurisdiction of the court.

Penn *v.* Lord Baltimore, 1 Ves. 444.
Brown *v.* Desmond, 100 Mass. 267, 269.

In Massie *v.* Watts, *supra*, at p. 160, Marshall, C.J., stated the general principle thus: —

"In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

In Hart *v.* Sanson, 110 U. S. 151, 154, 155, Mr. Justice Gray thus summarized the basis of this branch of equity jurisdiction: —

"Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. Langdell Eq. Pl. (2d ed.), Secs. 43, 184; Massie *v.* Watts, 6 Cranch, 148; Orton *v.* Smith, 18 How. 263; Vandever *v.* Freeman, 20 Tex. 334.

It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Felch *v.* Hooper, 119 Mass. 52; Ager *v.* Murray, 105 U. S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title".

Ot course this is *à fortiori* true when the subject matter of the trust is personal property, whether tangible or intangible.

(*b*) *This Right of the Beneficiary is Taxable at his Domicil.*

The problem of the case at bar is therefore merely the application of the principles determining jurisdiction to tax intangible personal rights of this character. To state the nature of the right of the benefici-

ary of a trust is to solve that problem. Being a chose in action, a right to enforce a personal obligation either voluntarily assumed by or imposed by law upon a trustee to deal with specific property for the benefit of the owner of the obligation, it attaches to the person of that owner, with his other personal property, and becomes a part of an entire estate. Like credits due him, it may be taken into account by the jurisdiction of his domicil in imposing a tax upon him measured by his wealth. That the trustee is not within the jurisdiction is as immaterial as the fact that his debtors may also be beyond the jurisdiction.

As pointed out by the Massachusetts courts in Peabody *v.* Treasurer and Receiver-General, 215 Mass. 129, 131, the rights of the beneficiary of a trust in their relation to the power of taxation are closely analogous to shares of stock in corporations.

Ownership of such shares gives to the shareholder certain intangible rights against the corporation. It is under various specific obligations to him and he has definite rights against it in relation to its property. He is entitled to participate in the net profits of its business, to enforce the use of its capital for its corporate purposes, to restrain abuses of corporate powers, and to receive his proportion of the net property of the corporation upon its dissolution.

On the other hand, ownership of such shares constitutes the shareholder a member of the incorporated association, usually with a voice in the selection of its officers and in the management of its affairs. By virtue of that membership he is or often may be made subject to certain liabilities of a greater or less extent. The statute creating the corporation determines the conditions of membership in such an association and

imposes such burdens upon and grants such privileges to that membership as it chooses. Such shares are thus property having a distinctly dual character.

Accordingly, shares of stock may be subject to a property tax during the lifetime of the shareholder or to a succession tax on his death by the jurisdiction of his domicil.

> Hawley *v.* Malden, 232 U. S. 1.
> Bullen *v.* Wisconsin, 240 U. S. 625, 631.
> Bellows Falls Power Co. *v.* Commonwealth, 222 Mass. 51; Same Case, 245 U. S. 630.
> Frothingham *v.* Shaw, 175 Mass. 59.

They may also be subjected to the same taxes by the jurisdiction which created the corporation.

> Corry *v.* Baltimore, 196 U. S. 466.
> Greves *v.* Shaw, 173 Mass. 205.
> *In re* Bronson, 150 N. Y. 1.

It would be entirely immaterial in such a case that all of the property of the corporation was real estate or other property entirely within the limits of the state which created the corporation. Shareholders residing elsewhere would still be clearly taxable at the place of their residence. So it is equally immaterial in the case at bar that the legal title to the personal property in question is held by persons not within the jurisdiction of Massachusetts, and that the documents representing that property are kept by them outside of Massachusetts. Whatever power these facts may give to the State of Pennsylvania, the rights of the petitioner in this case are still entirely *in personam*, enforceable only against the trustee, and therefore

those rights attach to the person of their owner and follow the petitioner to her domicil like her rights in any other intangible property.

If for taxation purposes we follow the common usage and adopt the assumption of courts of equity that the beneficiary of a trust is actually an owner of an "equitable interest" in the property itself, the result is necessarily the same. If by so doing his right reaches something higher than a *chose in action* and becomes a species of title to the property itself, at least when that property is intangible, such "interests" as much follow the person of their owner as do legal interests. If a legal interest in the property when owned by the beneficiary could be made the subject of a tax without reference to other conditions, so necessarily must an "equitable interest" in the same property. Under the decisions of the Court above cited it could not be questioned but that the securities involved here would be taxable in Massachusetts to the petitioner, if she were the legal owner thereof, even though the documents were actually kept in Pennsylvania. This must necessarily also follow as to all "equitable interests" in the same property.

It was upon such reasoning that the case of Hunt *v.* Perry, 165 Mass. 287, was decided. In that case the Massachusetts Court sustained the constitutionality of taxes assessed upon residents of that state on account of the capital value of personal property held in trust for them by testamentary trustees residents in another state and appointed by the probate court of that state. It is true that the Court in the course of its opinion indicated that it did not recognize the limitations on the power to tax where tangible prop-

erty is permanently located apart from its owner's domicil, but this limitation seems at that time to have had no recognition in the authorities. It was not established until the decision of Union Transit Co. *v.* Kentucky, *supra*, nearly ten years later. Except as its dictum with reference to tangible property is limited by this later decision, the opinion in Hunt *v.* Perry is in every way consistent with all the decisions of this Court.

In fact at the date of the tax now in question the Massachusetts Income Tax Law, as interpreted by the opinion in this case, imposed no tax on the income from property actually taxed to testamentary trustees in another state. That fact, however, is entirely immaterial to the validity of the tax. If no such exemption had been found to exist, it would have been merely another case of property, because of its dual character, subject to taxation in two jurisdictions. This trust property is subject to the control of two sovereigns. One may tax purely on the basis of the ownership of the legal interests in the property; the other on the basis of equitable rights therein. Each has the power to deal with the property from the point of view which gives to it power to tax. It is merely another instance of property within the taxing power of two jurisdictions, comparable to the instances of mortgages of real estate, shares of stock in corporations, and debts and credits already discussed. Thus the fact that Massachusetts has by St. 1919, c. 349, § 11, repealed this exemption can have no bearing upon the validity of taxes of this character in future years. This action merely means that, in view of the exemption of all income received by Massachusetts trustees for the

benefit of non-residents, the legislature has determined that it is just for it to exercise its constitutional powers over income received by residents from foreign trustees to their fullest extent.

III.

Certain Immaterial Matters.

(*a*) *Nature of Massachusetts Income Tax.*

It is of no importance in this case whether this tax be regarded as a property tax or an excise; or if the former, whether it is merely measured by the property to which it relates, or is a tax upon the property itself. In either case as was expressly pointed out in Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, it is sustained by the decisions of this Court.

In any event, it is plainly imposed *in personam.* Its fundamental basis is legal residence within the state, and it is imposed only upon residents. (St. 1916, c. 269, §§ 2, 5, 12.) No lien is imposed upon any property for its enforcement or collection. It is to be collected by the use of the same remedies as were formerly employed for the collection of taxes assessed upon personal property (St. 1916, c. 269, § 18), namely, by distraint of goods (St. 1909, c. 490, Part II, § 21), by arrest or imprisonment (§ 27), or by a personal action (§ 33). (*Infra*, pp. 31, 32.) There is no provision of any sort for proceedings against the particular property, the income of which is the measure of the tax. This tax is assessed upon inhabitants of Massachusetts in proportion to their ability to pay as measured by their receipts of income of certain classes in the year previous to the assessment of the tax.

(b) *Walker v. Treasurer and Receiver-General, 221 Mass. 600, distinguished.*

That case involved the question whether the Massachusetts Legacy and Succession Tax statute applied to and imposed a tax upon the exercise of a power of appointment by will by a Massachusetts resident in a case where the power was created by a will probated in another state, and where the trustee and all the securities of the trust under that will were beyond the jurisdiction of the state.

The Court held that, as upon the exercise of the power of appointment the property in question passed by the original will creating the power directly to the appointees, no privilege under the laws of Massachusetts was exercised. Under the Constitution of Massachusetts an excise can be imposed only where there is a "commodity" or privilege under the laws of that state. It followed that in that case, in view of the limitations of the Massachusetts Constitution, there was no valid basis for the imposition of an excise, and therefore there was no legacy and succession tax.

That case involved no question under the Federal Constitution. In fact a subsequent decision of this Court has made it clear that, if not prevented by the limitations of its own Constitution, Massachusetts would have the power, for the purpose of a legacy and succession tax, to treat an equitable life estate coupled with a general power of appointment as property owned in fee by the beneficiary.

Bullen *v.* Wisconsin, 240 U. S. 625.

But, of course, during the life of such a life tenant his rights in the trust fund, particularly his right to

receive the income thereof, may be regarded as a part of his total wealth and form the basis of a tax measured by that wealth, even though upon the exercise of a power of appointment at his death there would be no basis for a legacy or succession tax.

(c) *The Fact that the Courts of Massachusetts would not enforce this Trust.*

In Jenkins *v.* Lester, 131 Mass. 355, it was held that the courts of Massachusetts would not take jurisdiction of a bill in equity to enforce a trust established under a will by a judicial decree of a court of another state, at least, where there had been no ancillary proceedings in Massachusetts. This is not on the ground that a trust of this character is any different in its fundamental nature from a trust under a deed *inter vivos*, but rather on the ground that the court where the will has been proved and the trust established has first acquired jurisdiction over it, and that no other court ought to interfere with its administration, or could conveniently do so.

Smith *v.* Mutual Life Ins. Co., 14 Allen, 336, 342.

If a suit to enforce a trust under a deed was already pending in the courts of another state, the courts of Massachusetts would for the same reason refuse to take jurisdiction of a second suit for the same purpose, even though it obtained jurisdiction over all the parties.

Similarly, the Massachusetts Court refuses to litigate many matters relating to the internal affairs of

foreign corporations at the suit of stockholders or otherwise, even though all the parties are in court. It is considered that such matters may be more appropriately dealt with by the courts of the jurisdiction which created the corporation, since for the most part its laws will govern.

Williston *v.* Michigan Southern & No. Indiana Ry., 13 Allen, 400.
Smith *v.* Mutual Life Insurance Co., 14 Allen, 336.
Kimball *v.* St. Louis & San Francisco Ry. Co., 157 Mass. 7.
Richards *v.* Security Mutual Life Ins. Co., 230 Mass. 320.

Thus citizens of Massachusetts in many instances must go to the courts of other states to enforce their rights in foreign corporations in which they are shareholders. Yet in all cases shares of stock in such corporations held by inhabitants of Massachusetts are there taxable.

Hawley *v.* Malden, 232 U. S. 1.

(*d*) *Southern Railway Equipment Trust Certificates.*

Among the securities held by the Girard Trust Company in trust for the petitioner were "$2,000. 4½% Series T, Southern Railway Equipment Trust" (Rec. p. 9), which were bought during the tax year in question, the net interest on these during the year being $18.75. The only statement in the record as to the character of these certificates is as follows: —

"That the certificates of the Southern Railway Equipment Trust were exempt because all payments of interest or principal to the owners of said certificates were payments of rental for the use of tangible personal property having a situs outside the Commonwealth of Massachusetts and as rental were non-taxable under the laws of Pennsylvania." (Rec. p. 2.)

Apparently this Equipment Trust was some form of security given by the railroad as collateral for a debt. Very likely the title to the equipment was retained in fee for the benefit of the certificate holders who were the real creditors of the railroad. If so the transaction was, of course, the equivalent of a mortgage or pledge to trustees of personal property to secure a bond issue.

In that case, the Girard Trust Company, by virtue of its ownership of these certificates, held not a fractional interest in certain locomotives and cars but a portion of the debt of the railroad for the security of which locomotives and cars had been pledged. In that event these securities in no way differ from any other debt secured by a mortgage.

If it could be assumed that this equipment trust was merely a conditional sale by way of lease or otherwise and created no debt against the railroad, then the title to the tangible property included in it was not in the certificate holders, but in the trustees of the equipment trust. The certificate holders had merely an equitable right against the trustees of the same sort as had the petitioner against the Girard Trust Company. That right is not tangible property, subject to the rule of Union Transit Co. *v.* Kentucky, *supra*, but an intangible chose in action and like the petitioner's

right here subject to the general principles applicable to the taxation of intangible personal property as fully discussed in this brief.

However, in the absence of anything more definite in this record, the Court cannot assume that these equipment trust certificates are to be considered as materially differing for taxation purposes from shares of stock or corporate bonds. If the petitioner had intended to base a claim for exemption from taxation upon the peculiar character of this special item, she should have completely described the nature of the equipment trust.

CONCLUSION.

Accordingly the Tax Commissioner of Massachusetts contends that the tax assessed by him upon the petitioner, so far as it was sustained by the Massachusetts Supreme Judicial Court, was in all respects valid and that the judgment of the court below should be affirmed.

Respectfully submitted,

WM. HAROLD HITCHCOCK,
Attorney for Defendant in Error.

J. WESTON ALLEN,
Attorney-General of Massachusetts,
Of Counsel.

APPENDIX.

STATUTES.

The Massachusetts Income Tax Law (Gen. St. 1916, c. 269) contains the following provisions: —

. . . . . .

Section 2. Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum:

(a) Interest from bonds, notes, money at interest and all debts due the person to be taxed, except from:

. . . . . .

(b) Dividends on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, except national banks and except such foreign corporations as are subject to a tax upon their franchises payable to this commonwealth under the provisions of sections forty-three and fifty-two of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto.

. . . . . .

Section 9. The income received by estates held in trust by trustees, any one of whom is an inhabitant of this commonwealth or has derived his appointment from a court of this commonwealth, shall be subject to the taxes assessed by this act to the extent that the persons to whom the income from the trust is payable, or for whose benefit it is accumulated, are inhabitants of this commonwealth. The tax shall be assessed to such of the trustees as are inhabitants of the commonwealth.

Such part of the income of intangible personal property held in trust as is payable to or accumulated for persons who are not inhabitants of the commonwealth, shall be exempt from the taxes imposed by this act.

If an inhabitant of this commonwealth receives income from one or more executors, administrators or trustees, none of whom

is an inhabitant of this commonwealth or has derived his appointment from a court of this commonwealth, such income shall be subject to the taxes assessed by this act, according to the nature of the income received by the executors, administrators or trustees.

. . . . . .

SECTION 11. After the year nineteen hundred and sixteen, income which is taxable under the provisions of section five of this act, and, except as provided in section twenty-one, property, whether held by an executor, administrator, trustee or otherwise, the income of which, if any, is taxed or would be taxable under the provisions of section two of this act if received by an inhabitant of this commonwealth, shall be exempt from taxation under the provisions of chapter four hundred and ninety of the acts of the year nineteen hundred and nine and acts in amendment thereof and in addition thereto: *provided, however*, that in determining the amount of any tax upon a corporate franchise under the provisions of Part III of said chapter four hundred and ninety, the value of securities the income of which, if any, is taxed or would be taxable under the provisions of this act if owned by a natural person, shall not be included in the deduction, authorized by section forty-one of said part of said chapter, of securities which, if owned by a natural person resident in this commonwealth, would not be liable to taxation, but, for the purposes of section forty-three of said part of said chapter, shall be included among securities which, if owned by a natural person resident in this commonwealth, would be liable to taxation. This act shall not be construed to impose a tax upon any corporation or person in respect to income derived from property exempted from taxation by provisions of law existing prior to the passage of this act, nor shall anything in this act exempt from taxation, under the provisions of said chapter four hundred and ninety, real estate and tangible personal property.

SECTION 12. . . . The return required by this section shall be filed by every person who is at any time between the first day of January and the thirtieth day of June in any year an inhabitant of the commonwealth, if such person has in the preceding year received income taxable hereunder: provided, that the return

relating to income taxable under the provisions of this act, and received by any person who shall have deceased without having made a return relating to such income, shall be made by his executor or administrator; and provided, that in the case of any such person who has become an inhabitant of the commonwealth after the first day of February in any year, such return shall be due and shall be filed ninety days after he becomes such an inhabitant. Every person who is an inhabitant of the commonwealth at any time between the first day of January and the thirtieth day of June, both inclusive, in any year, shall be subject to the taxes imposed by this act.

. . . . . .

SECTION 18. If a tax assessed under the provisions of this act is not paid at the time when it is due, interest at the rate of six per cent per annum from that time shall be added to and become part of the tax. The tax commissioner, and the income tax assessors in their respective districts, shall have all the remedies for the collection of taxes assessed under the provisions of this act that are provided by chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto, for the collection of taxes on personal estate by collectors of taxes of cities and towns, and shall be allowed charges and fees as therein provided. Any action of contract brought to recover any such tax shall be brought in the name of the commonwealth.

. . . . . .

St. 1909, c. 490, Pt. I, § 23, cl. 5, as amended by St. 1911, c. 383, § 2, is as follows: —

"All personal estate, within or without the commonwealth shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of April, except as provided in Part III and in the following clauses of this section: —

. . . . . .

Fifth, Personal property held in trust by an executor, administrator or trustee, except as provided in section thirty-seven of Part III, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides,

if within the commonwealth; and if he resides out of the commonwealth it shall be assessed in the place where the executor, administrator or trustee resides; and if there are two or more executors, administrators or trustees residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator or trustee is not an inhabitant of the commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other state."

St. 1909, c. 490, Pt. II contains the following provisions with reference to the collection of taxes on personal estate:—

SECTION 21. If a person refuses or neglects to pay his tax for fourteen days after demand, the collector shall without unnecessary delay levy the same by distress or seizure and sale of his goods, including any share or interest he may have as a stockholder in a corporation incorporated under authority of this commonwealth or under the laws of the United States and located or having a general office in this commonwealth; but excluding the tools or implements necessary for his trade or occupation, beasts of the plough necessary for the cultivation of his improved land, military arms, utensils for housekeeping necessary for upholding life, and bedding and apparel necessary for himself and family.

SECTION 27. If a person refuses or neglects to pay his tax for fourteen days after demand and the collector cannot find sufficient goods upon which it may be levied, he may take the body of such person and commit him to jail until he pays the tax and charges of commitment and imprisonment, or is discharged according to law; but a person committed for the nonpayment of a poll tax shall not be detained in jail more than seven days.

SECTION 33. If a tax remains unpaid for three months after it has been committed to the collector, he may maintain an action in his own name against the person assessed therefor in the same manner as for his own debt.